A rule-based analysis and comparison of the case Studies

University of Edinburgh

School of Law

Research Paper Series

No 2018/38

A Rule-based Comparison and Analysis of Ten Case Studies

David Cabrelli
Professor of Law,
University of Edinburgh Law School
David.Cabrelli@ed.ac.uk

Irene-Marie Esser
Senior Lecturer in Commercial Law
University of Glasgow
Irene-Marie.Esser@glasgow.ac.uk

Published in M. Siems and D. Cabrelli (eds), Comparative Company Law - A Case-Based Approach, 2nd edition (Oxford, Hart, 2018), pages 473-518

Edinburgh School of Law Research Paper Series
University of Edinburgh

Abstract

Drawing on data derived from ten hypothetical case studies, we adopt a rule-based comparative evaluation of the company laws of twelve different jurisdictions. The ten case studies examine topics relating to directors' duties and liabilities generally and in the context of takeovers, the protection of creditors, including the relationship between creditors and a company, and the law governing shares, shareholders' rights and protection and the flexibility of company law. Each of the corporate law issues raised by the ten case studies are addressed by national reporters appointed in respect of the US (Delaware), UK, Germany, France, the Netherlands, Italy, Spain, Poland, Finland, Latvia, South Africa and Japan.[*] This paper compares and contrasts the formal company law rules recognised by each of these twelve countries as applicable in respect of the ten case studies, as well as the effects and consequences of the application of those rules. The value in the comparative assessment of the form and function of the relevant company law rules in each of the twelve jurisdictions under review lies in the additional light they can cast on four of the most enduring debates in comparative company law. These concern the propositions that:

(i) the pressures exerted by the increased pace of globalisation, international competition, interest groups, and imitation will inevitably lead to the convergence of company law rules (in terms of form or function) across all jurisdictions in the world, and in particular, assimilation to the US model of corporate law and governance ("the convergence proposition");

(ii) the patterns and structures of shareholder ownership (dispersed/outsider v concentrated/insider) of public joint stock companies in a country's main stock exchange will influence the nature and strength of the shareholder protection rules applicable in that country ("the patterns of share ownership proposition");

(iii) countries have a preference for a shareholder primacy model of corporate governance over that of a stakeholder or director primacy framework ("shareholder primacy proposition"); and

[*] For the first edition with these 10 case studies, see M. Siems and D. Cabrelli (eds) *Comparative Company Law: A Case-Based Approach* (Hart, 2013). See further D Cabrelli and M. Siems, "Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis" *American Journal of Comparative Law* (2015) 63 pp. 109-153.

(iv) the civilian legal origin of a country will influence its company law rules to such an extent that it will be inferior to a country that has its origins in the common law with regard to the level of (a) investor protection, (b) financial development, (c) access to finance, (d) government ownership and regulation, (e) security of property rights and (f) contract enforcement ("the legal origins proposition")..

In this chapter 12,[**] the authors seek to demonstrate what a careful analysis of the form and function of each of the legal rules operative in the twelve jurisdictions can reveal about the strength of each of these propositions. The conclusions are drawn that there is a lack of evidence for the legal origins, patterns of share ownership, and convergence propositions, but some available for the shareholder primacy one. The broader economic and legal policy implications of these findings are subsequently examined and conclusions drawn.

Keywords

Law; company law; comparative law; comparative corporate governance; convergence; legal transplants; legal origins; shareholder primacy; director primacy; stakeholder theory; patterns of share ownership; corporate law

[**] This paper is a reproduction of chapter 12 of M. Siems and D. Cabrelli (eds) *Comparative Company Law: A Case-Based Approach* 2nd edition (Oxford, Hart, 2018) available at https://www.bloomsburyprofessional.com/uk/comparative-company-law-9781509909360/.

12. A Rule-based Comparison and Analysis of Ten Case Studies

DAVID CABRELLI AND IRENE-MARIE ESSER

I. Introduction

Drawing on the data derived from the preceding ten chapters, a comprehensive comparative analysis can now be undertaken of the slew of company law rules identified in the twelve jurisdictions under review. The purpose of this exercise is to elicit a set of insights that make a genuine contribution towards the evolutionary progress of the subject of comparative company law. While the subsequent chapter 13 adopts a quantitative methodology to yield a series of findings – insofar as it codes company law rules, sources of company law and the product of such rules – this chapter will instead apply a rule-based comparative approach to produce a set of observations. Adopting a variant of the approach propounded by LoPucki specifically for comparative company law,[1] we identify the particular socio-economic and commercial problems in each of the case studies in the preceding chapters as our starting point. We then extract the relevant legal rules or principles applicable in each of the twelve jurisdictions from each of the case studies, and examine their nature, form and function, and how they seek to address these practical issues. Once identified, the governing rules are juxtaposed and assessed in order to achieve some higher purpose,[2] which in this chapter concerns the making of a meaningful contribution to four central propositions in comparative company law scholarship. A broader array of conclusions can be drawn from this process including the scrutiny of each of these four claims.

We can evoke two themes that have been raised in contemporary comparative company law debates to explain in greater depth the textual and qualitative approach that we adopt in this chapter:

[1] L LoPucki, 'A Rule-Based Method for Comparing Corporate Laws' (2018) 94 *Notre Dame Law Review* (forthcoming). At this stage of the process, we apply steps four to six of LoPucki's methodology: steps one to three were adopted in the preceding ten case studies, ie the formulation of a case study with a socio-economic problem or problems, the selection of a company entity type, and the application of the relevant legal rule or rules to resolve the case and produce a legal outcome.
[2] See HE Chodosh, 'Comparing Comparisons: In Search of Methodology' (1999) 84 *Iowa Law Review* 1025, 1049-1052 for the proposition that there ought to be some higher purpose to any rule-based comparison.

- First, relying on the division of comparative company law methodologies into seven distinct categories, each bearing a degree of relevance to the comparative exercise adopted in this and the following chapter,[3] we apply a complex amalgam of two of those seven strands. This will entail an evaluation of the *formal* company law rules recognised by the national reporters as applicable in their jurisdiction in the case findings, as well as the *effects and consequences* of the application of those rules. In essence, these two approaches involve rule-based and functional comparisons. The former enquires whether a rule of company law exists in more than one of the jurisdictions under review and is expressed in the same particular incarnation or form, whereas the latter is less formalistic and asks in what way the specific problems set out in the cases are tackled in each of the twelve countries in the same or similar ways, irrespective of the form that the relevant legal rules might take. The differences and similarities are then charted and the implications evaluated. It should be emphasised that each of these two instruments is applied in a selective and context-dependent manner. In certain cases, the method of formal comparison will be more appropriate as a tool, whereas in others, it will be the functional methodology that fits best.

- Secondly, we adopt the distinction between two particular categories that feature in the literature addressing taxonomy in comparative company law.[4] The first concerns the techniques for the evaluation of the differences and similarities in the form and function of the relevant legal rules that focus principally on the consequences for corporate law itself. This can be set apart from the second which involves consideration of non-legal factors. As will become apparent, two of the comparative company law themes analysed in this chapter are primarily law-focused in their nature – namely the (i) the legal origins and (ii) convergence claims. These can each be distinguished from the two claims concentrating on the relevance of (iii) patterns of share ownership and (iv) shareholder primacy, both of which operate 'beyond the law', as such.

The beginning of section III sets out the anatomical features and precise steps of the rule-based comparative method applied in this chapter. The claim is made that the originality and significance of this chapter lies not only in the *nature and content* of the comparative results

[3] M Siems, 'The Methods of Comparative Corporate Law' in R. Tomasic (ed), *The Routledge Handbook of Corporate Law* (London, Routledge, 2017) 13.
[4] M Siems, 'Taxonomies and Leximetrics' in J Gordon and W-G Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford, Oxford University Press, 2018) 228.

produced from the analysis of the governing rules drawn from the case studies, but also in *the assessment of their implications*. The novelty of the terms and effects of those results becomes all the more stark and insightful when they are compared with the results derived from the alternative methodological approach adopted in the subsequent chapter. In other words, having applied two differing comparative methodological approaches to subject the results drawn from the ten case studies to a measure of scrutiny, this and the next chapter adopt a kind of check and balance exercise to test the purchase of the respective comparative findings: the methodological techniques adopted in this and the next chapter are so diverse, that they may give rise to differing conclusions regarding the persuasiveness of the aforementioned four comparative propositions. As for the analytical rigour of the methodological approach employed, this is fully explained and justified at the inception of section III, with a particular focus on the four 'claims' tested in the comparative evaluations, to which we now turn in section II.

II. Aims and Implications of the Project and the Four Claims

One of the principal objectives of this book is to identify and understand possible differences and similarities in approach between legal systems in company law. By identifying the affinities between company law regimes as well as the extent, nature and scope of the disparities, the project has the potential to offer significant insights into the validity of four of the most central propositions in the field of comparative company law. These concern the claims that:

(i) the pressures exerted by the increased pace of globalisation, international competition, interest groups, and imitation will inevitably lead to the convergence of company law rules (in terms of form or function) across all jurisdictions in the world, and in particular, assimilation to the US model of corporate law and governance ('the convergence claim');

(ii) the patterns and structures of shareholder ownership (dispersed/outsider v concentrated/insider) of listed public companies in a country's main stock exchange will influence the nature, content and strength of the shareholder protection rules applicable in that country ('the patterns of shareholder ownership claim');

(iii) countries have, and ought to have, a preference for a shareholder primacy model of corporate governance over that of a stakeholder or director primacy framework ('shareholder primacy claim'); and

(iv) the civilian legal origin of a country will influence the content, nature and scope of its company law rules to such an extent that it will be inferior to a country that has its origins in the common law with regard to the level of its shareholder/investor protection ('the legal origins claim').

Each of these four claims are cross-cutting and overlap to some degree, which may be attributed to the fact that each of them at some level addresses the extent to which a single, carefully prescribed framework can ever function as the optimal 'default operating' system of company law within a decontextualised environment. For example, stripped to their core, the legal origins and convergence claims concern whether it is practically and normatively sustainable for the company law rules applied in the Anglo-American common law system to claim superiority in formal and functional terms. As for the link between the shareholder primacy proposition and the claims surrounding the centrality of patterns or structures of shareholder ownership, these can both be understood as concerned about one of the ultimate questions in company law: namely in whose interests the corporation ought to be run, for instance the directors, shareholders generally, minority shareholders, majority shareholders, or creditors, etc, as well as the climate within which such a prioritisation of interests ought to be made and observed. For example, it is claimed that company laws in dispersed shareholder ownership regimes – ie where the patterns of shareholder ownership of listed public companies in a country's main stock exchange are predominantly diffuse – ought to be designed to protect shareholders as a class from the potential misconduct of directors, such is the latter's power. Conversely, the same claim puts forward the proposition that the corporate laws of insider corporate governance systems – ie where the patterns of shareholder ownership of listed public companies in a country's main stock exchange are predominantly concentrated in a few key blockholders – should be oriented around protecting minority shareholders from the possibility of controlling shareholders using their majority stake to misbehave and extract private benefits of control.

Since the legitimacy of each of these four propositions has a direct bearing on economic policy at an international[5] and national level, the extraction and analyses of the comparative findings (drawn from the ten case studies) that are presented in this chapter has the capacity to influence the shape of future legal developments. It is also significant for the investment potential of legal systems, since it is said that countries with more robust and sophisticated shareholder protection regimes are more likely to attract higher levels of inward investment. Since company law is one of the determinants of such protective capacities,[6] these results and their consequences assume importance. In the next section we present a detailed explanation of these four claims.

A. Claim 1: Convergence and Divergence in Corporate Law and Governance Systems

This work intends to make a contribution towards the convergence claim.[7] In 2001, Hansmann and Kraakman wrote a very important article arguing that the US model of corporate law would ultimately 'win out' in a competition with the more traditional managerial model of US corporate law and the stakeholder and state-oriented models of civil law countries.[8] Indeed, certain studies have supplied evidence of such convergence, with a number of factors such as securities law and stock market requirements coalescing to dilute the differences between company law regimes across the world.[9] This phenomenon is partly

[5] See in particular, the 'Protecting Minority Investors' index of the World Bank's Doing Business Reports, http://www.doingbusiness.org/data/exploretopics/protecting-minority-investors, and the G20/OECD Principles of Corporate Governance, http://www.oecd.org/corporate/principles-corporate-governance.htm.

[6] Albeit only one, for example, securities laws, commercial laws, labour laws, and inward investment rules are also going to have a bearing on a country's ability to attract overseas capital.

[7] JC Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications' (1999) 93 *Northwestern University Law Review* 641, 679–80; DM Branson, 'The Very Uncertain Prospect of "Global" Convergence in Corporate Governance' (2001) 34 *Cornell International Law Journal* 321; JN Gordon and MJ Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge, Cambridge University Press, 2004); B Cheffins, 'Putting Britain on the Roe Map: The Emergence of the Berle–Means Corporation in the United Kingdom' in JA McCahery, P Moerland, T Raaijmakers and L Renneboog (eds), *Corporate Governance Regimes Convergence and Diversity* (Oxford, Oxford University Press, 2002) 147–70; M Siems, *Convergence in Shareholder Law* (Cambridge, Cambridge University Press, 2008); J Gordon, 'Convergence and Persistence in Corporate Law and Governance' in J Gordon and W-G Ringe (eds) *The Oxford Handbook of Corporate Law and Governance* (Oxford, Oxford University Press, 2018) 28.

[8] H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439; L Cunningham, 'Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance' (1999) 84 *Cornell Law Review* 1133; A Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA, Belknap Press, 1990); B Cheffins, 'Law, Economics and the UK's System of Corporate Governance: Lessons from History' (2001) 90 *Journal of Corporate Law Studies* 71, 76–89; R Kraakman et al, *The Anatomy of Corporate Law* 3rd edn (Oxford, Oxford University Press, 2017) 4–6. For criticism and commentary on this thesis, see A Winkler, 'Corporate Law or the Law of Business?: Stakeholder and Corporate Governance at the End of History' (2004) 67 *Law and Contemporary Problems* 109; C Williams and J M Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 *Cornell International Law Journal* 493; FA Gevurtz, 'The Globalization of Corporate Law: The End of History or a Never-Ending Story?' (2011) 86 *Washington Law Review* 475; M Walsh, P Spender, IL Fannon and K Hall, 'The End of the "End of History for Corporate Law"?' (2014) 29 *Australian Journal of Corporate Law* 147; Gordon, 'Convergence and Persistence in Corporate Law and Governance' (n 7); M Pargendler, 'Corporate Governance in Emerging Markets' in J Gordon and W-G Ringe (eds) *The Oxford Handbook of Corporate Law and Governance* (Oxford, Oxford University Press, 2018) 735. Hansmann and Kraakman have since written a reflection on their original article: H Hansmann and R Kraakman, 'Reflections on the End of History for Corporate Law' in AA Rasheed and T Yoshikawa (eds) *The Convergence of Corporate Governance: Promise and Prospects* (Basingstoke, Palgrave MacMillan, 2012) 32.

[9] Siems, *Convergence in Shareholder Law* (n 7); M Siems, 'Legal Origins: Reconciling Law and Finance and Comparative Law' (2007) 52 *McGill Law Journal* 55; see also more generally on the debate about convergence, BS Markesinis (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English law on the Eve of the 21st Century* (Oxford, Clarendon Press, 1994).

attributable to the growth of globalisation and, in particular, the pressures exerted by competition, interest groups and imitation. Convergence is not limited to growing similarities between the form, source and style of company laws. Instead, the phenomenon may occur at a number of levels, eg convergence in terms of the form or function of company law rules (ie specific rules designed to directly secure the protection of minority shareholders or creditors, or rules whose effect is to ensure such protection albeit indirectly (function)). Therefore, the evolutionary dynamic predicted by Hansmann and Kraakman and others is more nuanced and complicated than simply asking whether the form and sources of company laws have converged or are converging.

It is no exaggeration to say that Hansmann and Kraakman's article generated a reaction amongst comparative company law scholars across the world.[10] Many contested their arguments. For example, some commentators were of the view that the effect of regulatory competition amongst jurisdictions runs counter to convergence, leading inexorably to greater divergence amongst legal systems as each jurisdiction competes and engages in a 'race to the bottom' to attract incorporations.[11] Furthermore, cultural constraints, political-economic barriers[12] and the variations one encounters across jurisdictions in the legal rules on the protection of shareholders are other reasons advanced to explain why one ought to be sceptical about the potential for such convergence. Proponents of 'path-dependence' theory argue that the structure of a jurisdiction's corporate governance system and the shape of its company laws are conditioned by its cultural, social, economic and political past.[13] Hence, 'history matters', since once a jurisdiction has embarked upon a particular path, legal systems become 'locked in' to follow that same track and are conditioned by institutions built up within the system over the years. As a result, strong complementarities between different institutions in the system are generated, rendering it difficult and inefficient for that jurisdiction to suddenly shift direction by introducing an altogether novel set of institutions. For this reason, it is argued that the uniqueness of corporate governance systems ought to be

[10] For example, a search in Google Scholar at https://scholar.google.co.uk/scholar?hl=en&as_sdt=0%2C5&q=hansmann+kraakman+%22end+of+history+for+corporate+law%22&btnG= leads to 2,250 citations as at 3 March 2018.

[11] RJ Daniels, 'Should Provinces Compete? The Case for a Competitive Corporate Law Market' (1991) 36 *McGill Law Journal* 138; P Rose, 'EU Company Law Convergence Possibilities after Centros' (2001) 11 *Transnational Law and Contemporary Problems* 121.

[12] Cheffins, 'Putting Britain on the Roe Map' (n 7); Gordon and Roe, *Convergence and Persistence in Corporate Governance* (n 7); MJ Roe and M Vatiero, 'Corporate Governance and Its Political Economy' in J Gordon and W-G Ringe (eds) *the Oxford Handbook of Corporate Law and Governance* (Oxford, Oxford University Press, 2018) 56.

[13] See B Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford, Oxford University Press, 2008) 55–56; MJ Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 *Harvard Law Review* 641, 653–60; RJ Gilson, 'Corporate Governance and Economic Efficiency: When Do Institutions Matter?' (1996) 74 *Washington University Law Quarterly* 327, 329–34; JC Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications' (1999) 93 *Northwestern University Law Review* 641, 646–47, 660–61.

strengthened and permitted to evolve organically in accordance with the existing legal, political, social and economic infrastructure.[14]

In what way can it be claimed that an analysis of the ten case studies will make a contribution towards assessing this broader convergence claim? The stated contribution can be made by adopting the fourth, fifth and sixth stages of LoPucki's framework for conducting exercises in comparative company law,[15] namely by (4) extracting the controlling or governing rules applied by the twelve jurisdictions under review to address a particular corporate or commercial problem, (5) juxtaposing them at close quarters, and (6) subjecting them to a comparative evaluation that is designed to detect exact or approximate convergence in the rules in terms of their forms or functions. The greater the number of examples of identical, approximate or similar governing rules that we can extract from the case studies, the more persuasive the convergence proposition will become. Of course, one of the limitations of this study is that the terms 'convergence' and 'divergence' incorporate implicit references to time trends which the methodology applied will inevitably struggle to cover, for instance in terms of whether and how the governing rules are similar or vary longitudinally over time. Nevertheless, there is evident utility in pursuing this approach insofar as some useful insights can be gleaned about the current legal position, which will provide indications of the purchase of the convergence claim.

B. Claim 2: Share Ownership Structures and Patterns

The above-mentioned phenomenon is closely connected to the divergence in the patterns and structure of share ownership of the largest listed companies one finds in common law and civil law countries. In the capitalist market economies of common law jurisdictions such as the UK and the US, which are categorised as 'liberal market economies' in the 'varieties of capitalism' literature in the field of comparative political economy,[16] the corporate governance system is referred to as an 'outsider/arm's length' system of ownership and control. Ownership of the stakes of large public corporations quoted on the capital markets in such systems is widely dispersed with a general absence of dominant controlling

[14] LA Bebchuk and MJ Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127; UC Braendle and J Noll, 'On the Convergence of National Corporate Governance Systems' (2006) 17 *Journal of Interdisciplinary Economics* 57; MJ Roe, 'Some Differences in Corporate Structure in Germany, Japan and United States' (1993) 102 *Yale Law Journal* 1928; Gilson, 'Corporate Governance and Economic Efficiency' (n 13).
[15] LoPucki, 'A Rule-Based Method for Comparing Corporate Laws' (n 1).
[16] See AP Hall and D Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford, Oxford University Press, 2001); B Hancké, M Rhodes and M Thatcher, *Beyond Varieties of Capitalism: Conflict, Contradictions, and Complementarities in the European Economy* (Oxford, Oxford University Press, 2007); D Hope and D Soskice, 'Growth Models, Varieties of Capitalism and Macroeconomics' (2016) 44 *Politics and Society* 209.

shareholders.[17] Where a majority shareholder does exist, its holding expressed as a percentage of the total number of shares in a listed company tends to be low. This can be contrasted with 'co-ordinated market economies', in the varieties of capitalism literature where the corporate governance system is 'insider/control-oriented' in nature. This taxonomy roughly maps onto the company law regimes of the civil law jurisdictions where the share ownership of public corporations is concentrated in a single or a few blockholder controlling shareholders.[18] The patterns of shareholder ownership claim maintains that such systems tend to be characterised by weak minority shareholder protection, a phenomenon which is largely attributable to the ability of controlling shareholders to extract private benefits by virtue of their dominance and control.

The evidence for this division between dispersed and concentrated patterns of share ownership in common law and civil law countries can be found in the work of Stulz[19] and Franks & Mayer.[20] An article by Stulz published in 2005 sets out the equally weighted (EW) and value-weighted (VW) average percentages of shares held by corporate insiders across countries in 2002, where shares held by corporate insiders are proxied by the block holdings reported by Worldscope.[21] As one would expect, in jurisdictions such as the UK and the US, the average stakes of the largest shareholders are low expressed as a percentage of total share ownership, in comparison with the position in Germany, Italy, Spain and France, where the stakes are much higher. Likewise, data provided by Franks and Mayer brings the findings up to the year 2012 regarding the average shareholding of controlling shareholders.[22] Once again, the average stakes of controlling shareholders in civilian jurisdictions such as

[17] See J Franks and C Mayer, 'Evolution of Ownership and Control Around the World: The Changing Face of Capitalism' ECGI Finance Working Paper No. 503/2017, at 32-33, figures 13 & 16; S Deakin, R Hobbs, S Konzelmann and F Wilkinson, 'Anglo-American Corporate Governance and the Employment Relationship: A Case to Answer?' (2006) 4 *Socio-Economic Review* 155, 159–60; K Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation' (2011) 59 *American Journal of Comparative Law* 1, 9.

[18] See eg Kraakman et al, *The Anatomy of Corporate Law* (n 8) 24–28; M Becht and C Mayer, 'Introduction' in F Barca and M Becht (eds), *The Control of Corporate Europe* (Oxford, Oxford University Press, 2001); M Faccio and LHP Lang, 'The Ultimate Ownership of Western European Corporations' (2002) 65 *Journal of Financial Economics* 365; S Claessens, S Djankov and LHP Lang, 'The Separation of Ownership and Control in East Asian Corporations' (2000) 58 *Journal of Financial Economics* 81; R La Porta, F Lopez-de-Silanes, A Shleifer and R Vishny, 'Corporate Ownership Around the World' (1999) 54 *Journal of Finance* 471; RJ Gilson, 'Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy' (2006) 119 *Harvard Law Review* 1641.

[19] RM Stulz, 'The Limits of Financial Globalisation' (2005) 60 *Journal of Finance* 1595. See also G Aminadav and E Papaioannou, 'Corporate Control Around the World', NBER WP 23101 (Dec. 2016) (figs. 4a, 4b: Type of Control in 2012, 2007).

[20] Franks and Mayer, 'Evolution of Ownership and Control Around the World' (n 17). See also B Cheffins, 'The Undermining of UK Corporate Governance(?)' (2013) 33 *Oxford Journal of Legal Studies* 503; B Cheffins, SA Bank and H Wells, "Questioning 'Law and Finance": US Stock Market Development, 1930-70' (2013) 55 *Business History* 601; W-G Ringe, 'Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG' (2015) 63 *American Journal of Comparative Law* 493; J Franks, C Mayer and H Miyajima, 'The Ownership of Japanese Corporations in the 20th Century' ECGI Finance Working Paper No. 410/2014; K Reddy, N Mirza and Y Yin, 'The Relationship Between Ownership Identity, Ownership Concentration and Firm Operating Efficiency: Evidence from China 2005-2012' available at https://ssrn.com/abstract=2479274: each of these papers and articles comment on the UK, German, Japanese and Chinese positions in much greater detail. For the contrary argument that the US is no longer a dispersed shareholder ownership system, see RJ Gilson and JN Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863.

[21] Stulz, 'The Limits of Financial Globalisation' (n 19) 1604 at figure 4. Franks and Mayer (n 17) also document the evolution of ownership and control of firms around the world over a hundred-year period from the beginning of the 20th century to the present day.

[22] Franks and Mayer, 'Evolution of Ownership and Control Around the World' (n 17) 32-33, figures 13 & 16.

Germany, Poland, Italy, France and Latvia are much higher than those found in the UK, Ireland and US.

The reason that such evidence is important is that the patterns of share ownership claim argues that the main focus of company laws in dispersed/outsider jurisdictions such as the UK and US is, and ought to be, on protecting shareholders as a class from the conduct of managers and directors that are prejudicial to the former's interests, the latter being in a position to further their own positions at the expense of the former.[23] Furthermore, a large degree of emphasis is placed on corporate disclosure and market control by outsiders. However, since the governance of companies in 'insider/control-oriented' systems tends to be closely co-ordinated between management and the blockholding controlling shareholders, many commentators[24] adhering to the patterns of shareholder ownership claim contend that company law protections in civil law jurisdictions ought to be — and in actual fact are — designed to protect minority shareholders. The argument runs that the 'agency costs' which arise in civilian 'insider/control-oriented' jurisdictions are horizontal, ie attributable to a misalignment in the interests of majority shareholders and minority shareholders, rather than a vertical misalignment between the interests of directors and shareholders generally as a class, which is predominant in common law jurisdictions.

In order to understand the possible 'agency costs' at play in a listed public company, it is also useful to consider Kraakman et al,[25] who expound a tripartite division of 'agency costs', namely between:

(i) directors/managers and shareholders — 'vertical agency costs', which are prevalent in common law 'liberal market economies' such as the UK and the US where shareholdings are widely dispersed;

(ii) majority shareholders and minority shareholders — 'horizontal agency costs', encountered principally in civil law 'coordinated market economies' such as France, Germany and Italy, where shares are concentrated in the hands of a 'blockholder' or a few blockholder shareholders; and

(iii) shareholders and non-shareholder constituencies such as creditors, employees, suppliers, etc.

[23] Kraakman et al, *The Anatomy of Corporate Law* (n 8) 2 and 29–32.

[24] See Kraakman et al, *The Anatomy of Corporate Law* (n 8) 29–32; Cheffins, *Corporate Ownership and Control* (n 13) 4–7; E Berglöf, 'A Note on the Typology of Financial Systems' in K Hopt and E Wymeersch (eds), *Comparative Corporate Governance: Essays and Materials* (Berlin, De Gruyter, 1997) 151–64; J Armour, S Deakin and S Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 *British Journal of Industrial Relations* 531, 533.

[25] See Kraakman et al, *The Anatomy of Corporate Law* (n 8) 29-32.

The debate as to which of the 'outsider/arm's length' or 'insider/control-oriented' systems of ownership and control is superior or more efficient has not been resolved: the jury is still out. The same can be said about the purchase of the central claim advanced by the patterns of shareholder ownership proposition that 'insider/control-oriented' civilian jurisdictions prioritise the diminution of horizontal agency costs whereas 'outsider/arm's length' systems such as the US and UK place greater emphasis on tackling vertical agency costs.

With its emphasis on case-oriented factual problem-solving across common law and civil law jurisdictions, the approach pursued in this book has the potential to test the descriptive relevance of the dichotomy struck in the literature between 'outsider/arm's length' and 'insider/control-oriented' systems of corporate governance. This can be best achieved by adopting a two-pronged approach. Firstly, the evidence from both Stulz's and Franks & Mayer's research will assist us in reaching conclusions regarding the share ownership patterns, stakes and structure of the twelve specific jurisdictions examined in this study. For instance, we can identify whether the US (Delaware), UK, Germany, France, Netherlands, Italy, Spain, Poland, Finland, Latvia, South Africa and Japan are outsider/dispersed or insider/concentrated systems. Secondly, the data derived from the ten case studies can be analysed alongside Stulz's and Franks & Mayer's findings. If the results from the ten case studies point towards the existence of legal techniques in civilian jurisdictions that prioritise or suggest a preference for the constraint of horizontal agency costs over vertical agency costs, this will furnish some support for the patterns of shareholder ownership claim adopted in the literature. Likewise, if the case-based methodology reveals that common law jurisdictions pay less attention to legal mechanisms whose purpose it is to restrict horizontal agency costs. The case-based approach is particularly well-suited to such an endeavour, since the solutions to the cases across the selected common law and civil law jurisdictions can be compared and contrasted in close juxtaposition where the interests of (a) majority shareholders and minority shareholders or (b) directors and shareholders generally conflict with each other. The constituency favoured by each of the solutions can then be duly identified and evaluated within the broader framework of the patterns of shareholder ownership claim.

C. Claim 3: Shareholder and Stakeholder Theories

The debate concerning the normative role of the company and in whose interests it should be run is one of the most venerable in company law.[26] The most versed frameworks are those prioritising the interests of shareholders, stakeholders or directors. In shorthand, these are referred to respectively as the 'shareholder primacy', 'stakeholder' and 'director primacy' models. The shareholder primacy model[27] holds that it is a director's duty to maximise the wealth of a company for the benefit of shareholder welfare: shareholder wealth maximisation is thus the *ends* and fundamental objective of company law.[28] It can be contrasted with the stakeholder theory,[29] which posits that directors should run the company in the interests of a wider variety of stakeholders.[30] Finally, the director primacy model demands that the shareholders surrender power in exchange for the achievement of the shareholder wealth maximisation goal[31] and that the most efficient way for the corporation to achieve these ends is to concentrate management in the hands of the board of directors as the primary decision-making body in the company.[32] Seen from this perspective, although shareholder wealth

---

[26] AA Berle, 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365–1372, 1372; AA Berle, 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049–1074, 1049; EM Dodd, 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145–1163, 1148; M Friedman 'The Social Responsibility of Business is to Increase Its Profits', New York Times Magazine, September 13, 1970. For discussion, See Kraakman et al (n 8) 24–28;

[27] On shareholder primacy, see generally B Sheehy, 'Scrooge – The Reluctant Stakeholder: Theoretical Problems in the Shareholder–Stakeholder Debate' (2005) 14 *University of Miami Business Law Review* 193–240, 208 indicating that this does not mean that other parties (or stakeholders) should be ignored, but that shareholders should receive primacy when directors manage a company.

[28] However, shareholder welfare is not necessarily the same thing as maximising share market value: O Hart and L Zingales, 'Companies Should Maximize Shareholder Welfare Not Market Value' (2017) 2 *Journal of Law, Finance and Accounting* 247.

[29] The term 'stakeholder theory' was first used in 1963 at the Stanford Research Institute, although it can be traced back to work done by Dodd in the 1930s. See T Clarke, 'The Stakeholder Corporation: A Business Philosophy for the Information Age' (1998) 31 *Long Range Planning* 182–194, 182–194; B Sheehy, 'Scrooge – The Reluctant Stakeholder' (n 27) 200. On the stakeholder theory, see generally M Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962); RE Freeman and WM Evan, 'Corporate Governance: A Stakeholder Interpretation' (1990) 19 *Journal of Behavioural Economics* 337–359; VS Baumfield, 'Stakeholder Theory from a Management Perspective: Bridging the Shareholder/Stakeholder Divide' (2016) 31 *Australian Journal of Corporate Law* 187; I Chiu, 'Operationalising a Stakeholder Conception in Company Law' (2016) 10 *Law and Financial Markets Review* 173 and SF Mansell, 'An Introduction to Stakeholder Theory' and 'The Philosophy of Stakeholder Theory' in *Capitalism, Corporations and the Social Contract: A Critique of Stakeholder Theory* (Cambridge, Cambridge University Press, 2013) chs 2 and 3.

[30] ET Penrose, *Theory of the Growth of the Firm* 3rd edn (Oxford, Oxford University Press, 1995) laid the intellectual foundations for the stakeholder theory in her concept of 'the company as a bundle of human assets and relationships'. See also Clarke, 'The Stakeholder Corporation' (n 29) 182–194 and JE Fisch, 'Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy' (2006) 31 *The Journal of Corporation Law* 637, 647; MM Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Washington DC, The Brookings Institute, 1995) in the foreword states that corporations may be conceived as institutional arrangements for governing the relationships between all the parties that contribute company-specific assets, including, for example, employees who contribute specific skills (see also Clarke, , 'The Stakeholder Corporation' (n 29) 171). See also Sheehy, 'Scrooge – The Reluctant Stakeholder' (n 27) 201 where he discusses the stakeholder theory, stating that economics and efficiency are not ultimate values and that the distribution of costs and benefits for society's resources are also important.

[31] Some of the literature is as follows: S Bainbridge 'Director v. Shareholder Primacy in the Convergence Debate' (2002) 16 *The Transnational Lawyer* 45; S Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 *Northwestern University Law Review* 546, 549; S Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2005) 119 *Harvard Law Review* 1735; S Bainbridge, '*Unocal* at 20: Director Primacy in Corporate Takeovers' (2006) 31 *Delaware Journal of Corporate Law* 769; S Bainbridge, 'The Case for Limited Shareholder Voting Rights' (2006) 53 *UCLA Law Review* 601; S Bainbridge, 'Director Primacy' in CA Hill and BH McDonnell (eds) *Research Handbook on the Economics of Corporate Law* (Cheltenham, Edward Elgar 2010); LE Strine Jr, 'Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Duelling Ideological Mythologists of Corporate Law' (2014) 114 *Columbia Law Review* 449; S Bainbridge, 'Director versus Shareholder Primacy in New Zealand Company Law as Compared to USA Corporate Law' (2014) *UCLA School of Law, Law-Econ Research Paper* 14-05; S Bainbridge, 'Preserving Director Primacy by Managing Shareholder Interventions' in J Hill and R Thomas (eds) *Research Handbook on Shareholder Power* (Cheltenham, Edward Elgar 2015) 231.

[32] In the UK, for example, the company must have a board of directors regardless of its size in terms of ss.154-155 Companies Act 2006. The board is given the general authority to exercise all powers of the company for the management of the company's business in terms of Art.3 of the Model Articles for both private and public companies: see Schs 1, 2 and 3 to the Companies (Model Articles) Regulations 2008

maximisation is the *ends* of company law, a director primacy framework is the best *means* of achieving this goal. The shareholder primacy, stakeholder and director primacy theories are closely associated with the contractual (or contractarian/agency/*nexus*-of-contracts) theory of the firm.[33] The contractual model is based on the contractarian or agency theory, whereby the company is seen as a *nexus* of contracts.[34]

Jurisdictions such as South Africa and the UK have both recently introduced a framework known as 'enlightened shareholder value' which sits somewhere at a mid-way point, counterpoised between the shareholder primary and pluralist approaches or theories. Although the enlightened shareholder value approach provides for the protection of shareholders, other stakeholders' interests are also considered. However, their interests are subordinate to those of the shareholders. Ultimately, profit maximisation is the main goal of the directors and as such, the model is not entirely pluralist in configuration, to the extent that the directors would owe fiduciary duties directly to different stakeholders under the latter approach. In this way, the enlightened shareholder value and pluralist approaches both operate at some distance from the traditional shareholder-oriented understanding where the shareholders and their interests are the exclusive beneficiaries of the attention of directors when the latter manage the company.

The ten case studies and the conclusions drawn in respect of each of the twelve countries under review will be used to determine whether a specific jurisdiction is more in line with the shareholder primacy model, director primacy model or a framework that prefers the interests of the company's stakeholders' interests. Seen from this perspective, it is necessary to have a sound theoretical foundation concerning shareholder primacy and the more recent developments adopted by some jurisdictions involving the recognition of the interests of different stakeholders, such as employees, creditors and consumers. In the evaluation of the case studies the discussion will thus address whether a specific jurisdiction is more in line

(SI 2008/3229). This, it is argued, represents the default rule that the board of directors are the primary decision-making body in the firm, and as such are intended to be the focus of this nexus of contracts.

[33] On these theories see generally, MC Jensen and W Meckling, 'Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305; EF Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288; EF Fama and MC Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301; CA Hill and BH McDonnell, 'The Agency Cost Paradigm: The Good, the Bad, and the Ugly' (2015) 38 *Seattle University Law Review* 561; S Bottomley, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (1997) 19 *Sydney Law Review* 277; A Keay, 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors' (2003) 66 *Modern Law Review* 665, 672; J Velasco, 'The Fundamental Rights of the Shareholder' (2006) 40 *University of California Davis Law Review* 407–467; H Hansmann and M Pargendler, 'The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption' (2014) 123 *Yale Law Journal* 100; for the theory that corporate law is also concerned with the minimisation of 'principal costs' as well as 'agency costs', see Z Goshen and R Squire, 'Principal Costs: A New Theory for Corporate Law and Governance' (2017) 117 *Columbia Law Review* 767.

[34] K Greenfield, 'The End of Contractariansim: Behavioral Economics and the Law of Corporations' in E Zamir and D Teichman, (eds) *The Oxford Handbook of Behavioral Economics and the Law* (Oxford, Oxford University Press, 2014) 518; M Klausner, 'The "Corporate Contract" Today' in J Gordon and W-G Ringe (eds) *The Oxford Handbook of Corporate Law and Governance* (Oxford, Oxford University Press, 2018) 84.

with models reflecting shareholder primacy, stakeholder protection or director primacy. A caveat should be sounded, however, that some of the case studies considering small private companies may lack relevance to this enquiry, since it may be that the shareholders, directors and stakeholders involved are bound up in the same single individual.

D. Claim 4: The Legal Origins Claim and its Critics

The 'legal origins' proposition is connected to the wider notion or theories of 'legal families' and 'path dependency' in the general comparative law literature.[35] The principal contention advanced by La Porta, Lopez-de-Silanes, Shleifer and Vishny ('LLSV') in a series of articles[36] is that corporate law regimes grounded in the tradition of the common law are more protective of shareholders than civilian systems:

> Compared to French civil law, common law is associated with (a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, (b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labor markets, and smaller unofficial economies, and (c) less formalized and more independent judicial systems, which are in turn associated with more secure property rights and better contract enforcement.[37]

The argument posits that the direct correlation between regimes which protect shareholders and the sophistication of the state of the capital markets and financial development of a jurisdiction means that civil law countries suffer from a weaker level of stock market development. This has developed into a highly influential body of academic literature,[38]

---

[35] See eg M Siems, *Comparative Law* (Cambridge, Cambridge University Press, 2014) 41-93; U Mattei, T Ruskola and A Gidi, *Schlesinger's Comparative Law, Cases—Texts—Materials* 7th edn (Eagen, Thomson West, 2009) 258–64; J Husa, 'Legal Families' in J Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham, Edward Elgar Publishing Ltd, 2006) 389; K Zweigert and H Kötz, *Introduction to Comparative Law* 3rd edn (Oxford, Clarendon Press, 1998) 72–73.

[36] See eg R La Porta, F Lopez-de-Silanes, A Shleifer and R Vishny, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113; La Porta et al, 'Corporate Ownership Around the World' (n 18); E Glaeser and A Shleifer, 'Legal Origins' (2002) 117 *Quarterly Journal of Economics* 1193; R La Porta, F Lopez-de-Silanes, C Pop-Eleches and A Shleifer, 'Judicial Checks and Balances' (2004) 112 *Journal of Political Economy* 445; R La Porta, F Lopez-de-Silanes and A Shleifer, 'What Works in Securities Laws?' (2006) 61 *Journal of Finance* 1; R La Porta, F Lopez-de-Silanes and A Shleifer 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285; S Djankov, R La Porta, F Lopez-de-Silanes and A Shleifer, 'The Law and Economics of Self-dealing' (2008) 88 *Journal of Financial Economics* 430.

[37] La Porta et al, 'The Economic Consequences of Legal Origins' (n 36) 298.

[38] The 'law and finance' literature is extensive: S Deakin and K Pistor (eds), *Legal Origin Theory* (Cheltenham, Edward Elgar, 2012); K Pistor, 'Law *in* Finance', (2013) 4 *Journal of Comparative Economics* 311; K Pistor, 'A Legal Theory of Finance' (2013) 4 *Journal of Comparative Economics* 315; GM Hodgson, 'Observations on the Legal Theory of Finance', (2013) 4 *Journal of Comparative Economics* 331; S Deakin, 'The Legal Theory of Finance: Implications for Methodology and Empirical Research' (2013) 41 *Journal of Comparative Economics* 338; M Siems, 'The Leximetric Research on Shareholder Protection' in J Hill and R Thomas (eds), *Research Handbook on Shareholder Power* (Cheltenham, Edward Elgar, 2015) 168; Siems, 'Taxonomies and Leximetrics' (n 4); R McQueen, 'How Corporate Law Matters: The Debate as the Interrelationship Between Legal Origin and Economic Performance' in R Tomasic (ed), *The Routledge*

particularly via the Doing Business reports of the World Bank.[39] The ascendancy of the common law position is said to be attributable to a low level of government ownership and regulation of corporations, fewer formalised judicial procedures and the emphasis it attaches to the reasoned and incremental development of company law through a highly independent judiciary.[40] To claim that this scholarship is influential is undoubtedly correct.[41]

However, for obvious reasons, the 'legal origins' theorem has generated a great deal of controversy. The critiques[42] vary from concerns about the failure of the theory to consider the political determinants of corporate law and corporate governance systems to its deterministic and reductionist core of reasoning[43] and the adequacy of the methodological approach adopted by LLSV and the assumptions that underpin the conclusions drawn from the empirical results. For example, Roe refers to the tendency of governments of a 'left-wing' social democratic hue to favour the interests of labour over capital. In such systems, company laws protecting shareholders as a class are eschewed owing to the governmental preference to prioritise the demands of labour, which leads to a greater intensity in conflicts between the interests of shareholders and directors/managers. Greater opportunities arise for vertical agency costs which are attributable to the policy preferences of those 'left-wing' governments with a socialist tradition.[44]

Turning to the methodological deficiencies, the finding that robust shareholder rights lead to more effective and efficient capital markets and financial development was reached by LLSV on the basis of a limited range of coded variables and 'cross-sectional data on the [company] laws of countries in the late 1990s, with no systematic coding of legal change over

Handbook of Corporate Law, (London, Routledge, 2017) 64; D Katelouzou and M Siems, 'Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990-2013' (2015) 15 *Journal of Corporate Law Studies* 127; C Bruner, *Corporate Governance in the Common-Law World* (Cambridge, Cambridge University Press, 2012); B Cheffins, S Bank and H Wells, 'Shareholder Protection Across Time' (2016) 68 *Florida Law Review* 691; B Cheffins, S Bank and H Wells, 'Questioning 'Law and Finance': US Stock Market Development, 1930-70' (2013) 55 *Business History* 601; AM Pacces, 'How Does Corporate Law Matter? Law and Finance and Beyond' in M Faure and J Smits (eds), *Does Law Matter? On Law and Economic Growth*, (Antwerp, Intersentia, 2011) 297; AM Pacces, *The Future in Law and Finance* (The Hague, Eleven International Publishing, 2013).

[39] See www.doingbusiness.org.

[40] La Porta et al, 'The Economic Consequences of Legal Origins' (n 36) 286.

[41] R Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57 *American Journal of Comparative Law* 765, 766.

[42] Some of the critical literature is as follows: MJ Roe, 'Corporate Law's Limits' (2002) 31 *Journal of Legal Studies* 233; MJ Roe, 'Legal Origins, Politics and Modern Stock Markets' (2006) 120 *Harvard Law Review* 460; M Siems, 'Shareholder Protection around the World: "Leximetric II"' (2008) 33 *Delaware Journal of Corporate Law* 111; J Armour, S Deakin, P Sarkar, M Siems and A Singh, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2009) 6 *Journal of Empirical Legal Studies* 343; J Armour, S Deakin, P Lele and M Siems, 'How Do Legal Rules Evolve?: Evidence from a Cross-country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 *American Journal of Comparative Law* 579; RV Aguilera and CA Williams, '"Law and Finance": Inaccurate, Incomplete, and Important' (2009) *Brigham Young University Law Review* 1413; J Armour, S Deakin, V Mollica and M Siems, 'Law and Financial Development: What We are Learning from Time-Series Evidence' (2009) *Brigham Young University Law Review* 1435; K Pistor, 'Re-thinking the "Law and Finance" Paradigm' (2009) *Brigham Young University Law Review* 1647; J Armour and P Lele, 'Law, Finance and Politics: The Case of India' (2009) 43 *Law & Society Review* 491; S Deakin, P Sarkar and M Siems 'Is there a Relationship Between Shareholder Protection and Stock Market Development?' (2017) ECGI Law Working Paper No. 377/2017.

[43] See R Schmidbauer, 'On the Fallacy of LLSV Revisited – Further Evidence About Shareholder Protection in Austria and the United Kingdom', available at https://ssrn.com/abstract=913968, 10-14.

[44] MJ Roe, *Political Determinants of Corporate Governance* (Oxford, Oxford University Press, 2003).

time'.[45] Studies conducted on the basis of longitudinal time-series coding systems have demonstrated that the evidence for a correlation between legal origins and stock market development is much more tenuous.[46] Moreover, these studies revealed that the level of shareholder protection in civil law regimes has been catching up with common law jurisdictions in recent years.[47] Subsequent research has also identified many coding errors,[48] and when the index is re-calibrated to remove them, the correlations found by La Porta *et al*. simply disappear.[49]

Moving on to the criticism of the assumptions underpinning the findings reached by LLSV, Pistor propounds three fallacies which lie at the heart of the 'legal origins' theorem. First, there is the 'extrapolation fallacy' whereby an unsubstantiated assertion is made that common law systems with stronger legal protections for shareholders invariably incentivise smaller investors to save their money in shares, leading to a broader investor base and greater capital market development.[50] Second, Pistor advances the 'transmission problem', which criticises the supposed unidirectional impact of legal origin on specific legal provisions in regulations, statutes and case law and more efficient economic outcomes.[51] Here, LLSV fail to address the possible feedback between legal origins, specific legal provisions and stock market development, ie reverse causality and the danger of drawing causal inferences from the data.[52] Finally, there is the 'exogeneity paradox' whereby LLSV assume that a country's legal origin is exogenous and thus independent of the political, social, economic and cultural context. Instead, there is evidence which shows that the state of a jurisdiction's stock market and economic development is dependent on a number of factors, including political and economic events and shocks.[53]

The case-based and rule-based comparative approach adopted in this work has the ability to offer some input into the legal origins paradigm. In particular, once extracted from the ten case studies, the governing rules in each of the twelve jurisdictions under review can be measured and compared in terms of the level of shareholder, director, majority shareholder, minority shareholder, or creditor protection which they provide. This can be achieved by

[45] Armour, Deakin, Mollica and Siems, 'Law and Financial Development' (n 42) 1437–38.
[46] Armour, Deakin, Sarkar, Siems and Singh, 'Shareholder Protection and Stock Market Development' (n 42).
[47] Armour, Deakin, Lele and Siems, 'How Do Legal Rules Evolve?' (n 42).
[48] S Cools, 'The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers' (2005) 30 *Delaware Journal of Corporate Law* 697; U Braendle, 'Shareholder Protection in the USA and Germany – "Law and Finance" Revisited' (2006) 7 *German Law Journal* 257.
[49] H Spamann, 'The "Antidirector Rights Index" Revisited' (2010) 23 *The Review of Financial Studies* 468.
[50] Pistor, 'Re-thinking the "Law and Finance" Paradigm' (n 42) 1648–56.
[51] Ibid 1656–59.
[52] H Spamann, 'Empirical Comparative Law' (2015) 11 *Annual Review of Law and Social Science* 131.
[53] Pistor, 'Rethinking the "Law and Finance" Paradigm' (n 42) 1659–62.

positioning the relevant rules alongside each other and then asking whether weak levels of shareholder protection correspond to those jurisdictions which are civilian, and strong levels in the case of common law jurisdictions. If the legal origins claim is valid, we would expect to find some correlation between common law regimes and enhanced rights and protection for shareholders generally at the expense of the protection and/or insulation from liability of (i) directors in respect of their decision-making and conduct, and/or (ii) creditors and other stakeholders. Although one cannot go so far as to contend that the findings of such a case-based methodology will operate to reveal the rationales for divergences in shareholder protection across the selected jurisdictions, there is considerable force in the view that it will serve to capture nuances in the level of shareholder protection which the cruder 'binary type' methodological approach of LLSV is unable to achieve. Moreover, it has the added attraction of possessing the capacity to expose the differences in the form and style of the legal rules which function to confer protection on the various constituencies whose interests are affected in each of the case studies. There are also clear overlaps here with the issues to be addressed in connection with propositions 2 and 3 above, as regards the prevailing pattern of shareholder ownership in a jurisdiction, and the orientation and nature of that jurisdiction's preferred theoretical model of corporate law.

III. Applying the Four Claims to the Hypothetical Cases

A. Methodology

The starting point to the methodology is first to isolate the relevant governing rule or rules (and their functions) applicable in each of the twelve jurisdictions considered in the ten case studies. These governing rules can be identified as the ones that 'correctly predict… or produce' the legal outcome.[54] The extraction of the controlling rules is done on a case study-by-case study basis, with particular emphasis on the key corporate legal issues in the cases. Once abstracted from each of the ten case studies, in a similar fashion to the traditional rule-based comparative approach taken by the Common Core of European Private Law,[55] the controlling or governing rules (and their functions) are examined in close proximity to each other. This enables the similarities and differences between them to be articulated and is also

[54] LoPucki (n 1) at para [29] and D Crump, 'The Twilight Zone of the Erie Doctrine: Is There Really A Different Choice of Equitable Remedies in the "Court A Block Away"?' (1991) *Wisconsin Law Review* 1233, 1244.

[55] See the Common Core website at http://www.common-core.org/ with details of the Common Core approach.

viewed in light of the case study conclusions in each of chapters 2 to 11. In the case of each of these rules, when viewed alongside each other, they ought to be broadly comparable insofar as they should be directed to resolve the same set of facts, perform the same function, and produce a legal result. The important point here is that in each of the jurisdictions, it is the governing rules – rather than the legal conclusions, results or outcomes reached or produced – that are the primary subject of the comparative evaluation.[56] The subsequent exercise in rule comparison is very specific, as it is channelled through the prism of certain evaluative criteria. The aim of the application of these criteria is to offer up useful insights, and in this chapter, these evaluative criteria correspond to the four claims versed above. That is to say, that the end products of that formal and functional comparison will be dissected and explored in order to feed into each of the four central propositions identified earlier in this chapter, ie whether the particular rules and their functions suggest convergence of company laws, and what they have to say about the relevance and relative impact of outsider versus insider patterns of share ownership on company law. Further, this process will shed light on the constituencies and groupings whose interests are prioritised by the company laws of the twelve jurisdictions, as well as the relevance of legal origins to shareholder protection, stock market efficiency and inward capital investment. It should be stressed that in some case studies, the function and rule-based findings may offer no helpful conclusions or insights as regards any of the four claims. However, that will not always be the case as much will depend on the context. The irrelevance of some case studies can be attributed to them failing to touch on any of the issues underpinning the four propositions in question. It is perhaps also a by-product of affording the authors a free hand or licence to draft the case studies on their own terms without external interference.[57]

B. Claim 1: The 'Convergence' Debate

In this section III B, we focus on what the case studies can reveal about the force and purchase of the convergence claim. At the outset, it should be stressed that the fact patterns and results of case studies 1 and 2 in chapters 2 and 3 offered little insights into the convergence claim. For that reason, they are excluded from consideration.

Case Study 3 (Obligations of Directors in Takeovers)

[56] However, this is not to say that the outcome, conclusion or result in the twelve jurisdictions will be irrelevant. As such, it will be taken into account as part of the evaluation albeit that it will not be the principal focus of the evaluative stage.
[57] See ch 1, above.

The facts of case study 3 arise in the context of a takeover and address whether directors have the power to take action to ward off a takeover bid without interference from the shareholders. When the governing rules of the twelve jurisdictions are juxtaposed and evaluated, it is clear that they each recognise that the directors of target companies will owe duties to the company where they attempt to influence matters to such an extent that a takeover bid is thwarted. However, notwithstanding that the EU Takeover Directive looms large and we would expect to find that each of the jurisdictions that are members of the European Union would recognise the board neutrality rule, instead, what we encounter is considerable divergence. This lack of uniformity is attributable to the existence of the opt-in and opt-out options in the EU Takeover Directive. Finally, in those jurisdictions that have accepted the board neutrality rule, we also witness a variety of governing rules that regulate the consequences of its breach. If we consider each of these findings as a whole, the conclusion can be reached that case study 3 supplies no evidence for the convergence claim. Instead, the various controlling rules of the twelve jurisdictions are notable for their diversity.

Case Study 4 (Cross-Border Takeovers and Takeover Defences)

Case study 4 also covers takeover bids. It examines the liabilities of directors in the takeover context and whether jurisdictions recognise laws that require (i) shareholders (rather than directors) to decide on the rights issue of fresh shares and (ii) compliance with shareholder pre-emption rights on a rights issue of fresh shares, in the case of a shareholders' rights plan that is designed to ward off a takeover bid. First, the governing rules of each of the European countries on the regulation of the allotment and issue of shares are characterised by a level of convergence inasmuch as this activity falls outside the power of the board of directors and is reserved to the shareholders for decision. Likewise, rules are also found in each of the European countries conferring pre-emption rights on the allotment and issue of shares in favour of the existing shareholders. This is in stark contrast to the position in the US and Japan, where the directors are entitled to initiate share rights issues and shareholder pre-emption rights do not exist. However, the European jurisdictions vary in their approach to the ability of shareholders to waive or exclude their pre-emption rights. For instance, in the UK, no specific reason for waiver or exclusion needs to be given, whereas in Germany, Italy and Spain, the law imposes limitations on the potential for shareholders to do so. This divergence between the European countries becomes all the more stark when the lawfulness of accounting for the interests of the employees in deciding on the shareholders' rights plan is placed under the microscope. French and German law would permit the interests of labour to be considered, whereas the opposite conclusion would be reached in terms of UK law. Once viewed in their entirety, the findings seem to neither substantiate nor challenge the convergence claim.

Case Study 5 (Piercing the Corporate Veil)

Chapter 6 which narrates case study 5 addresses whether the twelve jurisdictions under review recognise the doctrine on piercing the corporate veil, ie circumstances in which the courts will look behind the veil of incorporation to impose liability on the shareholders, directors or other groups. It also addresses whether the twelve jurisdictions have a rule that recognises an individual as a director notwithstanding that he/she has not been formally appointed. Turning first to the veil piercing doctrine, with the exceptions of Poland and Latvia, this is an undisputed part of the legal firmament of each of the twelve jurisdictions. However, in each of the jurisdictions where veil piercing holds sway, a claim is rarely successful, either because the doctrine is only applicable in a limited range of circumstances (Italy and Finland), the conditions or requirements for its invocation are difficult to satisfy (Japan, Germany, Spain, UK and the US), or because other areas of the law are more effective in offering creditors relief (eg tort law in the Netherlands). Once again, we encounter divergence in both the recognition of the doctrine, as well as the extent of, and the conditions for, its operation. As for the existence of governing rules that acknowledge individuals as directors in the absence of any formal appointment, the position is mixed. The concept of a de facto or prescribed director exists in the corporate laws of the UK, Spain and South Africa, but other jurisdictions such as Germany and Poland prioritise formality in appointments and reject the unofficial ascription of director status. Here again, the findings suggest the existence of palpable variances in the approaches adopted by each of the jurisdictions. However, the opposite point can be made regarding the recognition of duties imposed on directors to monitor the conduct of other directors appointed to the board. In the majority of the twelve jurisdictions under review, the content of a director's duty of care will encompass such an obligation to monitor.

Case Study 6 (Capital Maintenance)

The topic of this case study centres around the recognition of capital maintenance laws, rules controlling the payment of disguised distributions, and the regulation of managerial decisions to pay dividends. The US, South Africa and Japan do not recognise a capital maintenance principle - in the sense that capital can indeed be returned to the shareholders in these countries, subject to particular restrictions. As such, they are outliers to the extent that a capital maintenance doctrine does exist in each of the nine EU jurisdictions. Meanwhile, although the governing rules applicable in each of the twelve jurisdictions highlight the ubiquity of restrictions on dividend payments, there are marked variations in the nature of those limitations. Some jurisdictions adopt a ‘balance sheet surplus’ approach which can be compared to the ‘earned surplus’ approach applied in others. Likewise, the approaches towards the control of disguised distributions are characterised by an abundance of diversity, from a hard-line to more accommodating set of rules. Each of these findings are suggestive of little evidence for the convergence claim.

Case Study 7 (Shareholders and Shareholder Law)

This case study focuses on the legal recourse available to shareholders to challenge the failure of the company to pay a dividend, as well as the ability of shareholders to dispute a merger where a company fails to provide sufficient notice of a general meeting. With regard to the possibility of challenging the non-payment of dividends, there is considerable convergence in the twelve jurisdictions to the extent that they each have enabling governing rules. A variation can be seen in the attitude of those jurisdictions to the prospects of a successful suit, with some countries more protective of shareholders (Finland) than others (Delaware and Japan), such is the liberal orientation and nature of the former’s controlling rules. Turning to the scope for shareholders to take legal proceedings to annul a merger, there is considerable convergence in the governing rules applicable in the twelve jurisdictions under review. In each country, this would not be possible, although the exact grounds for such a rule differ. As such, this case study so far is the strongest to provide support for the convergence claim.

Case Study 8 (Abuse of Shareholder Rights)

The issues probed by this case study include the rights of shareholders to pose questions and demand answers at the general meeting of the company. The power of a shareholder to issue legal proceedings to block a merger approved at such a meeting is also raised by this case study. An examination of the governing rules applicable to the right to ask questions reveals a large degree of alignment across the jurisdictions with eleven of the twelve under review expressly recognising such an entitlement: the US is the sole country where this right is absent. The majority of the jurisdictions also empower shareholders to challenge resolutions approving a merger. However, a variety of conditions are placed on the assertion or successful application of such a right, some of which are general whereas others are tailored more to merger resolutions in particular. This gives rise to the conclusion that a material degree of legal convergence can be seen to applicable.

Case Study 9 (Shareholders' Rights and Litigation)

In this case study, one of the central issues is whether a technical breach of company law or a company's constitution can be cured by the unanimous assent of the shareholders. The second key matter is the extent to which resolutions passed by the board of directors are subject to challenge by third parties who are not shareholders or directors. Finally, the case study considers whether shareholders are afforded the right to enforce a breach of a director's duties, for instance by raising shareholders' derivative proceedings or some other mechanism. With regard to the scope for curing technical breaches, a close analysis of the governing rules in each of the twelve jurisdictions reveals that most recognise a form of the unanimous assent rule (France and Italy are the exceptions). However, the conditions imposed on the operation of that rule differ, for instance in some jurisdictions written approval is demanded and mere conduct is insufficient. To that extent, convergence is clearly applicable here. Likewise, each of the twelve jurisdictions denies third parties the right to challenge board resolutions, although the machinery adopted and reasoning for this outcome differs along the common law/civil law divide. As noted in the conclusion to this case study, this gives rise to functional convergence in the result, but formal divergence in the company law rules applicable. Turning to the possibility of shareholders challenging violations of directors' duties, derivative actions and other direct or indirect enforcement mechanisms are common to both common law, 'mixed' and civil law jurisdictions, as is the concept of controlling shareholders' fiduciary duties. However, as highlighted in the conclusion to the case study, there is considerable divergence across national boundaries as regards the party or parties against whom litigation ought to, or could be, raised, the nature of those legal proceedings, the nature of the remedy and the grounds for receiving such a remedy. In conclusion, there is clear convergence in the outcomes reached, but diversity in the rules that pertain in each of the jurisdictions, as well as the enforcement machinery and remedies, which suggests a complex amalgam of convergence and divergence.

Case Study 10 (Limitations on the Shareholder's Right to Transfer Shares)

There are two principal company law issues examined in this case study. The first question is whether the twelve jurisdictions entitle companies and their shareholders to include and enforce shareholders' pre-emption rights on the transfer of shares in the constitutions of non-listed public companies. The second matter is interrelated, and probes the extent to which non-listed public companies are precluded from including provisions in their constitutions which prohibit or restrict the automatic transmission of the shares of deceased shareholders to their heirs or legatees. The vast majority of the jurisdictions will permit companies to include share pre-emption rights on transfer, but many impose diverse forms of ex ante or ex post restrictions or review on their application. However, in three countries, namely Germany, Finland and Japan, such pre-emption clauses are unlawful. To that extent, there is a modest degree of evidence for convergence. Having said that, what is particularly striking about the common law jurisdictions that recognise constitutional pre-emption restrictions on the transferability of shares is the comparatively few controls on such restrictions vis-à-vis the civilian countries. As for the legal validity of restrictions on the transferability of shares on the death of a shareholder, there is clear divergence in the approaches adopted between the Common Law and Civilian countries. In the UK, USA and South Africa, very few (if any) checks or limitations are imposed on clauses which confer pre-emption rights in favour of shareholders where a fellow shareholder is deceased. However, this is not the case in the Civilian jurisdictions where we encounter two distinct approaches. First, the position in Germany and France is that any restrictions on the free transferability of shares are not allowed. This can be contrasted with Spain, Poland, Latvia and Finland where such provisions are lawful, but numerous conditions are imposed. On balance, the governing rules of the twelve countries by and large suggest a lower degree of convergence than divergence in the legal positions.

Conclusions

The findings to be drawn from each of the above case studies can be charted in a table.

Table 12.1: Results from Case Studies Regarding the Convergence Claim

Case Study	Convergence?	Divergence?	Observation
3	*x*	✓	Mainly divergent
4	✓	✓	Mixed evidence
5	*x*	✓	Mainly divergent
6	*x*	✓	Mainly divergent
7	✓	*x*	Mainly convergent
8	✓	*x*	Mainly convergent
9	✓	✓	Mixed evidence
10	*x*	✓	Mainly divergent
Total	**4**	**6**	Mainly divergent

What Table 12.1 demonstrates is that by and large, the convergence claim lacks substance. Indeed, the range of areas in which convergence is evident may be partly or directly attributable to European successes in harmonising company law. The results of this rule-based and function-based methodology are consistent with those produced in chapter 13, which in light of other mounting evidence, gives rise to the conviction that the convergence claim may be overstated. Indeed, if the authors were to hazard a view, it may well be that the convergence claim is simply a relic that has survived the initial post-Cold War period from which it is an abstraction.

C. Claim 2: Shareholder Ownership Patterns and Structures

This section III C which probes the validity of the patterns of shareholder ownership claim, is one of the main illustrations of the proposition made in section III A that the purchase of a number of the four claims II A to II D will not be assisted or advanced in any way by some of the ten case studies. In fact, this is one of the variables where comparatively few of the ten case studies have any bearing or anything useful to contribute: only case studies 2 and 5 have anything to offer by way of insights. There is also an irony associated with the fact that these two case studies are analysed for the purposes of testing this claim, which translates into an additional potential limitation. Case studies 2 and 5 cover private companies and non-listed plcs, rather than listed plcs. Since the fundamental premise of the patterns of shareholder ownership claim is that the characteristics of the ownership of shareholdings of the largest listed plcs in a jurisdiction will dictate the orientation of the controlling company law rules, this arguably leaves the methodology adopted open to the charge that the data produced from these case studies can only be irrelevant. However, this argument can be countered by the point that the governing rules identified as applicable in each of the twelve jurisdictions for the purposes of case studies 2 and 5 will nonetheless retain their relevance on the basis that they are the same irrespective of whether the company concerned is private or a non-listed or listed plc. For example, in case study 2, if the company concerned had been a listed plc, there would be no variation in the applicable UK company laws: the same point can be made about case study 5. As such, the fact that the governing rules would not change enables this counterpoint to be dismissed as overblown.

Case Study 2 (Duties of Nominee Directors)

This case study sheds light on the question whether shareholders will owe a duty to the company or minority shareholders when they exercise their voting powers. As discussed in section II B above, in 'insider/block-holder' systems of corporate governance where horizontal agency problems outweigh other agency concerns, the claim is made that the configuration of the applicable company laws ought to restrain the power of the majority shareholders – and not the directors. If this analytical framework is accurate, then a jurisdiction where the share ownership of public listed companies tends to be held in blocks, and not dispersed, should recognise legal rules or principles that impose a fiduciary duty on controlling shareholders that is owed to the minority shareholders or company when the former exercise their voting rights. In the final analysis, the findings from case study two will enable us to ascertain whether there is indeed a link between the pattern of share ownership of companies in a jurisdiction and the legal imposition of duties on majority shareholders.

In his article 'The Limits of Financial Globalization',[58] Stulz distinguishes countries with blockholder share ownership structures from countries where the share ownership tends to be

[58] Stulz, 'The Limits of Financial Globalisation' (n 19) 1604. See also Franks and Mayer, 'Evolution of Ownership and Control Around the World' (n 17) 32-33, figures 13 & 16

more dispersed. His results are shown in columns 2 and 3 and the fourth column sets out the results that can be derived from case study 2:

Table 12.2: Results from Case Study 2

Jurisdiction	**Blockholding**[59]	**Dispersed**[60]	**Is a shareholder fiduciary duty owed to the company or minority shareholders? No or Yes.**
Latvia	✓ (78%)		NO RESULTS IN THIS CASE STUDY.
France	✓ (40%)		YES
Germany	✓ (51%)		YES
Italy	✓ (43%)		NO
Spain	✓ (51%)		YES
The Netherlands		✓ 23%	YES
Finland	✓ 31%		NO RESULTS IN THIS CASE STUDY.
Poland	✓ (68%)		YES
UK		✓ 11%	NO
US		✓ 15%	YES
South Africa	✓ (46%)		NO
Japan	✓ (41%)		YES

The countries *in italic*s in Table 12.2 fail to adhere to the suggested link between the imposition of fiduciary duties on majority shareholders and the share ownership structure of a jurisdiction. In particular, South Africa and Italy are two 'insider/blockholding' jurisdictions which produce results that are in non-conformance with the underlying theory. Both South

[59] The standard adopted is that where the value-weighted average percentage of a single shareholder is > 30 = a blockholding jurisdiction. The mandatory bid rule in the law regulating takeovers is taken as a proxy for the relevant level of share ownership that constitutes a blockholding: the mandatory bid threshold is 30% in most EU Member States.
[60] Conversely, the position adopted is that a value-weighted average percentage that is < 30 = a dispersed jurisdiction.

Africa and Italy have value-weighted average percentages of blockholder shareholders that are quite high, but neither of these countries recognise legal rules to the effect that the majority shareholders owe a fiduciary duty to the minority shareholders or the company when they vote. The US and the Netherlands are also outliers, although for the opposite reason. Both have a dispersed shareholder ownership structure, but the majority shareholders do owe a fiduciary duty to the company when exercising their rights. This fails to align with the underlying claim that the principal focus of company laws in dispersed/outsider systems of corporate governance will not be to subject majority shareholders to legal obligations to the company or minority shareholders. Taken as a whole, this exercise in evaluating case study 2 in chapter 3 demonstrates that the findings in respect of six out of the twelve jurisdictions are consistent with the patterns of shareholder ownership claim, whereas four of the twelve conflict with that proposition, and two of the jurisdictions are inconclusive.

Case Study 5 (Piercing the Corporate Veil)

For the purposes of the patterns of shareholder ownership claim, the relevant issue in this case study is whether or not a majority shareholder can ever be treated as a shadow director and as such, be subject to directors' duties. If the theoretical proposition suggesting a link between patterns of share ownership and the legal recognition of majority shareholder duties is valid, the answer to this question should be positive in a system that is characterised by an insider/blockholder shareholder ownership structure. This is attributable to the majority (blockholder) shareholder having the capacity to exercise majority rule and instruct the directors on what to do. In contrast, in an 'outsider/dispersed' shareholder ownership system, since the shareholders are more diffuse, they would have insufficient powers of co-ordination to influence the behaviour and decision-making of directors, leaving the latter to exercise rule. The *italicized* countries listed below in Table 12.3 do not adhere to this presumption.

Table 12.3: Results from Case Study 5

Jurisdiction	Blockholding[61]	Dispersed[62]	Shareholders treated as shadow directors?
Latvia	✓ (78%)		UNCLEAR
France	✓ (40%)		YES
Germany	✓ (51%)		NO
Italy	✓ (43%)		YES
Spain	✓ (51%)		YES
The Netherlands		✓ 23%	YES
Finland	✓ 31%		UNCLEAR
Poland	✓ (68%)		NO
UK		✓ 11%	YES
US		✓ 15%	NO
South Africa	✓ (46%)		YES
Japan	✓ (41%)		YES

The findings set out in Table 12.3 reveal that for the countries *in italics* (ie Germany, the Netherlands, Poland and the UK) the governing legal rules do not conform to the patterns of shareholder ownership claim. In Germany and Poland, if the proposition were correct, then one would expect to encounter a legal rule in these jurisdictions that recognises that shareholders can constitute shadow directors and as such, owe duties to the company and/or minority shareholders. However, that is not the case. In the case of the Netherlands and the UK, the results are also inconsistent with the patterns of shareholder ownership proposition. The value-weighted average percentage of blockholders in the Netherlands and the UK is low, but there are legal rules that make it possible for shareholders to be treated as directors, which can result in liability for a failure to consider the interests of the company and/or minority shareholders. Turning to the jurisdictions that are not *italicized*, each of them bar Latvia and Finland (where the results are unclear) do indeed track the patterns of shareholder

[61] > 30% = a blockholding jurisdiction.
[62] < 30% = a dispersed jurisdiction.

ownership proposition. In this way, the majority of the twelve jurisdictions conform, but a substantial minority do not.

Conclusions

Of course, the findings derived from case studies 2 and 5 in chapters 3 and 6 provide a limited sample and are unrepresentative when expressed as a percentage of the total number of case studies, ie only 20 per cent. There is the added dimension of the corporate form of the companies covered by the two case studies, although that point can be closed off by the realisation that the governing rules in the jurisdictions would not change if the companies were listed plcs. The results are also mixed, with 6 of the twelve countries in case study 2 and 6 of the twelve countries in case study 5 exhibiting consistency with the primary claim that structures of shareholder ownership will dictate the nature and strength of fiduciary duties imposed on controlling shareholders. This is in comparison with four of the twelve jurisdictions in case studies 2 and 5 where no consistency between the orientation of the legal rules and shareholder ownership patterns could be discerned. Subject to the limitations expressed above regarding the lack of representativeness of the findings, on balance, they do cast a degree of doubt on the purchase and plausibility of the patterns of shareholder ownership claim. The best that can be said is that in the majority of cases, the claim will hold true, but in a substantial minority, the opposite will be the case. Of course, this is hardly a ringing endorsement of the underlying premise, which means that we perhaps ought to reserve a degree of scepticism about its accuracy and for the bolder claims made about its consequences.

D. Claim 3: Shareholder or Stakeholder-orientated Approach

We now evaluate each of the case studies to determine whether the specific country in question leans more towards the shareholder primacy, stakeholder protection or director primacy models of corporate governance. This objective can be achieved by examining the governing rules for each of the twelve countries that can be derived from the case studies and then applying two subordinate questions, namely:

a) Do any of the jurisdictions stand out in this context;
b) What conclusions can be drawn from these controlling rules?

The product of the application of these questions are presented in separate tables on a case study-by-case study basis in the Annex to this Chapter. As such, the detailed results and findings are not presented in this section. Instead, a composite Table 12.4 is presented towards the end of section III D setting out the extent to which the corporate governance systems of the twelve jurisdictions can be claimed to be predicated on a shareholder, stakeholder or director primacy framework.

Case Study 1 (General case on Directors' Duties)

This case study primarily addressed directors' duties. Here, there are three issues that can be highlighted. First, whether there was a breach of the director's duty of care and skill. Secondly, whether shareholder ratification or authorisation is valid in the context of a breach of directors' duties. Finally, this case study also covers the extent to which creditors are protected in the twelve legal systems. Depending on how each of the jurisdictions dealt with these issues, it is possible to draw certain conclusions on their positions relating to shareholder primacy, director primacy and stakeholder protection.[63] For instance, a jurisdiction that recognises company laws that shield directors from liability for breach of their duties is suggestive of a director primacy system of corporate governance. In contrast, countries that permit shareholders to authorise a breach of directors' duties in advance, or to ratify such a breach ex post facto, are consistent with a framework that embraces a shareholder primacy regime. Finally, if it is not possible for directors to be insulated from liability for a breach of duty and the content of those duties specifically enjoins directors to further the interests of the company's stakeholders such as its creditors, suppliers, clients, employees or communitarian or environmental concerns, this provides some evidence of a stakeholder-oriented corporate governance system.

Case Study 2 (Duties of Nominee Directors)

The issues addressed in this case study do not make any useful contribution towards testing the validity of the shareholder primacy claim. As such, it is yet another illustration of the point made at section III A above.

Case Study 3 (Obligations of Directors in Takeovers)

The facts of case study 3 enable us to extract findings regarding the force of the shareholder primacy claim, specifically in the context of a takeover. In some jurisdictions, the takeover

[63] See the discussion in ch 1, section III A, above.

rules will be more shareholder friendly. For example, if a jurisdiction recognises the ‘board neutrality’ rule, the directors of the target company are prevented from frustrating a takeover offer without the approval of the shareholders. It thus follows that the main purpose of the ‘board neutrality’ or ‘anti-frustration’ rule is to protect the shareholders of the target company from defensive measures taken by its own directors, ie to prioritise shareholder primacy. In the EU, companies have the option to opt in or to opt out of this rule. However, if a country opts out of this rule then the company must nonetheless have the right to implement board neutrality provisions in the company’s articles or by-laws. The end result is that many European countries recognise a strong or weak form of the board neutrality rule. However, other jurisdictions reject it. This means that their legal systems legitimise governing rules that confer power on the directors to entrench their positions by frustrating a takeover bid and/or depriving the shareholders of the choice whether to accept or reject a bid. Since the rules are much more oriented towards directors, such a jurisdiction would be suggestive of a director primacy regime of corporate governance: the more countries adopting such an approach, the less purchase associated with the shareholder primacy claim. The relative positions of each of the twelve jurisdictions are set out in Table 4.1 in chapter 4.

Case Study 4 (Cross-Border Takeovers and Takeover Defences)

This case study focuses on the protection offered to the employees of a target company in the takeover context. As such, it is possible to test the validity of the shareholder primacy claim inasmuch as the greater the number of jurisdictions that prioritise the concerns of stakeholders over shareholders, the less persuasive the proposition becomes. In other words, this case study asks to what extent takeover/company law rules allow directors to take decisions purely in the interests of employees (as stakeholders).

Case Study 5 (Piercing the Corporate Veil)

This case study probes the extent to which the law prescribes that directors must directly safeguard or protect the interests of creditors when a company is in the vicinity of insolvency or ultimately enters into bankruptcy. Bankruptcy or its vicinity are both situations where shareholder interests are in opposition to those of creditors as stakeholders. As such, in this particular environment, the extent to which shareholder or stakeholder primacy is in fact a model adopted by the jurisdictions under review can be subjected to close scrutiny. A second relevant issue in the context of this case study relates to the monitoring of directors by directors. If it can be shown that the law imposes no liability on a director for a failure to monitor the board, this is indicative of an approach leaning towards director primacy insofar as directors are insulated from legal reproach. In such a case, this acts as a counterpoint to the shareholder primacy claim.

Case Study 6 (Capital Maintenance)

In this case study, the relevant issue is whether the law offers protection to creditors and specifically whether or not a creditor can challenge the illegitimate transfer of value from the company to the shareholders where this is disguised as a dividend. If this is legally permissible, then this points in the direction of an approach favouring the interests of stakeholders and casts doubt on the cogency of the shareholder primacy claim. Thus, once again, the tension in this regard is between the shareholder primacy claim and stakeholder protection.

Case Studies 7 and 8 (Shareholder and Shareholder Law)

Case studies 7 and 8 both address the rights of shareholders. Where a broad range of rights are conferred in favour of shareholders, this provides support for the shareholder primacy claim. However, if shareholders enjoy a limited variety of legal rights, it can be argued that the interests of directors are prioritised; the greater the number of shareholder rights, the more powerful the impact on the balance of constitutional power struck between the shareholders and directors, with more restrictions imposed on the director's scope for manoeuvre and decision-making.

In case study 7, four specific issues were identified which should provide some insights concerning the legal position of shareholders relative to directors in each of the jurisdictions under review. These matters are as follows:

- the shareholder's right to receive a dividend;
- the shareholder's right to annul a merger;
- the shareholder's right to challenge the confiscation of property in exchange for cash; and
- a breach of the shareholder's right to receive notice of a general meeting.

The subject matter of case study 7 is similar to the issues addressed in case study 8, where the following rights of shareholders were considered:

- the shareholder's right to ask questions at a general meeting;

- whether the board has a duty to respond to all questions asked by shareholders at a general meeting;
- whether a decision taken at the general meeting will still be valid where all the other shareholders agree to it;
- whether it is possible for a shareholder to raise a legal claim to annul a resolution passed at a meeting; and
- whether there is a doctrine of abuse of shareholder rights.

The responses to these questions are considered in their totality to determine the extent of the global protection offered to shareholders in each of the jurisdictions under review.

Case Study 9 (Shareholder Rights and Litigation)

The relevant question in this case study concerns the rights of enforcement of shareholders where a director (or a third party) has committed a breach of duty, for instance whether a shareholder can raise a derivative action or a variant thereof and whether the directors are protected from such claims because the governing rules of the jurisdiction generally exclude them. The strength of the actual derivative action is also assessed in terms of how likely it is to be successful: the stronger the scope for the derivative action to succeed, the better the protection for the shareholders. In this way, the shareholder primacy claim can be tested, since the lower the prospects of success, the more compelling the claim that a jurisdiction adopts a director primacy framework to insulate the board from liability. The data derived from each of the twelve jurisdictions is also combed for evidence of stakeholders having the right or power to raise derivative enforcement action, including the likelihood of success of such a claim. In such a case, evidence is supplied of the recognition of stakeholder claims against directors.

Case Study 10 (Limitations on the Shareholder's Right to Transfer Shares)

This case study dealt with restrictions on the transfer of shares in the articles or by-laws of a company, for instance shareholder pre-emption rights on the transfer of a shareholder's shares or the transmission of shares on the death of a shareholder. Accordingly, the extent to which the interests of existing shareholders are protected in the context of pre-emption rights is subjected to analysis in this case study: the more heightened the shareholder protection, the more convincing the shareholder primacy claim. In this regard the competing interests of the company's stakeholders or the directors were not addressed in this assessment, but rather a measurement was taken of the power or strength of the shareholder protection mechanisms.

Conclusions

Based on the findings derived from the case studies above, it has been possible to ingather evidence concerning whether shareholders, stakeholders or directors are the primary consideration and focus of the company laws in each of the twelve jurisdictions reviewed in this book. The following table 12.4 illustrates the findings (the separate tables, one per case study, are in the Annex):

Table 12.4: Results from Case Studies 1, 3, 4, 5, 6, 7, 8, 9 and 10 Relative to Shareholder, Stakeholder or Director Primacy

Jurisdiction	Evidence of shareholder primacy										Evidence of stakeholder protection										Evidence of director primacy									
Case Study	1	3	4	5	6	7	8	9	10	**T**	1	3	4	5	6	7	8	9	10	**T**	1	3	4	5	6	7	8	9	10	**T**
Latvia	✓	✓			✓				✓	**4**	✓	✓			✓				✓	**4**	✓	✓			✓				✓	**4**
France						✓	✓	✓	✓	**4**	✓		✓	✓	✓					**4**	✓	✓								**2**
Germany		✓				✓	✓	✓	✓	**5**			✓	✓	✓					**3**	✓									**1**
Italy		✓	✓		✓	✓	✓	✓	✓	**7**	✓			✓						**2**	✓									**1**
Spain		✓	✓			✓	✓	✓	✓	**6**	✓			✓	✓					**3**	✓						✓			**2**
The Netherlands		✓				✓	✓		✓	**4**	✓	✓	✓	✓	✓					**5**	✓	✓						✓		**3**
Finland		✓	✓			✓	✓	✓	✓	**6**	✓			✓	✓					**3**	✓									**1**
Poland	✓		✓			✓	✓		✓	**5**				✓	✓					**2**		✓								**1**
UK	✓	✓	✓			✓	✓	✓	✓	**7**				✓	✓					**2**										**0**
US	✓				✓			✓	✓	**4**				✓						**1**	✓	✓	✓			✓	✓			**5**
South Africa		✓	✓			✓	✓	✓	✓	**6**	✓			✓	✓					**3**	✓									**1**
Japan	✓					✓	✓	✓	✓	**5**				✓	✓					**2**	✓	✓	✓							**3**

On the basis of these results, it is possible to reach a number of conclusions about the validity of the shareholder primacy claim. The first point that can be made is that although the results are rather mixed – as one might expect – and to some extent rather surprising, a clear majority of the twelve jurisdictions conform to the shareholder primacy claim. Table 12.4 demonstrates that the legal positions in South Africa, the UK, Italy, Spain, Finland and

Poland tend to favour the protective capacity for shareholders, which provides a signal that such jurisdictions correspond to the shareholder primacy claim. This can be contrasted with the governing rules applicable in France which underscore an equally weighted preference for the protection of the interests of stakeholders and shareholders. Germany adopts a similar approach to France, albeit more attenuated to the extent that the shareholder primacy claim enjoys fractionally more salience. Meanwhile, the Netherlands is a jurisdiction which is an outlier to the extent that a majority of its governing rules are characterised by a preference for the advancement of the rights of stakeholders. As for the US, the findings match its caricature as a jurisdiction that adopts a director primacy approach to the extent that its prevailing philosophy is that the most effective means of heightening the interests and wealth of shareholders is to enlarge the discretionary powers of the directors and suppress shareholder interference in corporate decision-making. Finally, the relevant controlling legal rules applicable in Latvia demonstrate no preference for the interests of either of the three constituencies, and Japan exhibits a marginal partiality towards the shareholders over the directors and stakeholders.

E. Claim 4: Legal Origins

Each of the case studies is scrutinised for evidence of the legal origins claim. If this proposition is valid, we would expect to find some correlation between common law regimes and enhanced rights and protection for shareholders generally at the expense of the protection (i) and/or insulation from liability of directors in respect of their decision-making and conduct, and/or (ii) of creditors and other stakeholders. It should be stressed that South Africa is treated for these purposes as belonging to the Common Law family. This is despite the fact that it is a mixed legal system, ie a regime with a deep Romano-Dutch foundation with a Common Law superstructure. The justifications for this decision are twofold. First, the company laws of South Africa are largely based on English Law. Secondly, company law is an area of law whose formation post-dates the original Romano-Dutch base. On a related theme, Japan is treated as a Civilian system in this study, notwithstanding that it is also a mixed Common Law and Civilian jurisdiction, with a framework grounded in German and US law. Once again, certain case studies repay little attention inasmuch as they fail to touch on the legal origins proposition. It is for that reason that we begin the discussion with case study 3.

Case Study 3 (Obligations of Directors in Takeovers)

From an evaluation of the findings from case study 3, there would appear to be no evidence for the legal origins theorem. First, the UK follows the EU approach towards the obligations of directors in takeovers, namely that they are subject to the 'board neutrality' rule: if the legal origins proposition held true, one would expect to find some deviation between the position in the UK and EU jurisdictions. To that extent, the UK, which is a common law jurisdiction, is fully aligned with the legal position in the EU. Moreover, the US and Japan diverge from the UK and EU positions and according to the legal origins theory, the ability of directors in the US and Japan to engage in frustrating action would provide shareholders with fewer legal protections and as such generate greater barriers to their companies accessing finance than companies situated in the UK and EU. However, there is no evidence to suggest that access to finance in the US and Japan is subject to a greater array of frictions and rigidities as a result of the failure of their legal systems to tackle managerial defensive action in a takeover context. It follows that case study 3 suggests that the legal origins claim is overplayed.

Case Study 4 (Cross-Border Takeovers and Takeover Defences)

Three propositions can be derived from the takeover context in case study 4. First, the legal position in Italy, Spain and Germany is noteworthy in that a reason is needed for the pre-emption rights of existing shareholders to be excluded. However, that is not the case in the UK, where there are no restrictions on the power of an individual shareholder to waive pre-emption rights on the allotment and issue of new shares. This seems to substantiate the legal origins claim, as it underscores the comparatively liberal position of the UK in empowering shareholders to exercise their freedom of choice. Secondly, the governing rules regulating the shareholders' rights plan in the US, Japan and South Africa differ radically from the European jurisdictions. In the European countries, rights of pre-emption on the issue of fresh shares are uniformly required, whereas there are no such restrictions in Japan, US and South Africa. As such, we can characterise South African, Japanese and US law as less protective of shareholders than is the case in the EU. Although this suggests an element of alignment amongst the EU jurisdictions, it does represent a challenge to the convergence and legal origins claims more generally, since the UK and US have divergent laws and levels of shareholder protection in this context, notwithstanding that they are both common law countries. The fact that there are disparities in South African law and UK law also casts some doubt on a related claim that legal transplants are easy,[64] to the extent that the host jurisdiction South Africa would appear to have rejected the rule from which its company law was originally derived. Finally, consideration of the interests of constituencies such as employees in the takeover bid context is firmly scotched in the case of UK and US company law (unless this also furthers shareholder protection), which can be contrasted with the position in other EU jurisdictions such as Germany and France. This points towards some, albeit restricted, support for the legal origins proposition insofar as shareholder interests do appear to enjoy greater levels of prioritisation in Common Law regimes such as the UK and US than Civilian ones.

Case Study 5 (Piercing the Corporate Veil)

The country solutions to the case study provide little support for the legal origins claim, since there is no discernible pattern distinguishing Civil Law and Common Law countries from each other as regards the adoption of a piercing the corporate veil doctrine. In fact, countries in both these comparative law camps accept it. The only minor factor separating them is that in the US, the courts are least protective of creditors and by implication more preferential to shareholders, whereas the position is the exact opposite in France and Japan. However, this perhaps tells us nothing, since in the case of some Civilian jurisdictions such as the Netherlands, it is equally challenging as it is in the US to persuade a court to lift the veil of incorporation. This suggests that shareholders are also afforded an enlarged degree of priority over other constituencies in certain Civil Law countries.

Case Study 6 (Capital Maintenance)

Turning first to legal controls on distributions, the governing rules applicable in each of the twelve jurisdictions demonstrate that limitations on the payments of dividends are pervasive. What differs from one jurisdiction to the next is the form that those restrictions take. For example, the majority of jurisdictions adopt a 'balance sheet surplus' approach and this is encountered in both Common Law (US and South Africa) and Civilian countries (Germany, Italy, Latvia, etc). Turning to the controlling rules that apply in the context of disguised distributions, the conclusion to the case study provides evidence for clear divergence in the approaches adopted. Some jurisdictions prohibit such practices directly or indirectly

[64] See A Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (Athens, GA, University of Georgie Press, 1993) 95; A Watson, 'Society's Choice and Legal Change' (1980) 9 *Hofstra Law Review* 1473; R Cotterrell, 'Is there a Logic of Legal Transplants?' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Oxford, Hart Publishing, 2001) 71, 82; DA Skeel, Jr, 'Corporate Anatomy Lessons' (2004) 113 *Yale Law Journal* 1519, 1569.

(Germany, the UK, Finland, Poland and Latvia), whereas others do not, whilst recognising functionally equivalent legal rules to control the situation (Italy, France and the US). However, the most significant point is that of those states that adopt a restrictive approach against those that apply one that is more liberal and flexible, no dividing line can be seen along legal origins as regards the level of shareholder protection. Evidence in favour of the legal origins claim is also absent when it comes to an evaluation of the jurisdictions that have substituted solvency-based tests for principles of capital maintenance, which assess the liquidity of a company as part of the enquiry surrounding whether to authorise a distribution (Finland, the Netherlands and South Africa).

Case Study 7 (Shareholders and Shareholder Law)

A number of issues are touched upon in this case study which enable us to chart the relevance of the Common Law/Civil Law divide. The principal matters addressed are whether aggrieved shareholders are likely to obtain relief where the company fails to declare a dividend for a period of ten years and their prospects of success in challenging a merger resolution. As regards these issues, the conclusion to the chapter makes the point that there is no particular distinction in the governing rules applied in the Common Law and Civilian countries. However, this is not entirely accurate. For example, the governing rules also demonstrate that shareholders have no legal power or right to declare a resolution approving a merger as void in the UK or US, which can be distinguished from Civilian jurisdictions such as France, Italy and the Netherlands where this is a distinct possibility. Seen from this perspective, to the extent that shareholders experience greater protection in Civilian countries than they do in those governed by the Common Law, case study 7 reveals some compelling evidence for the exact opposite of the legal origins claim.

Case Study 8 (Abuse of Shareholder Rights)

The evidence to be derived from case study 8 suggests some, albeit a large measure of mixed, evidence for the legal origins claim. Both the Civilian jurisdictions and some Common Law countries such as the UK recognise the rights of shareholders to ask questions and demand answers at a company's general meeting. However, other Common Law jurisdictions such as the US reject such rights. This leads to a mixed assortment of results. It is when we turn to the entitlements of shareholders to attack merger resolutions that we encounter alignment in the governing legal rules in each of the twelve jurisdictions. In each country, such a challenge would be permissible, albeit that the prospects of success and limitations placed on the ability to challenge would differ.

Case Study 9 (Shareholders' Rights and Litigation)

In this case study, an examination of the rules governing the availability and operation of the unanimous assent rule demonstrate that shareholders in Common Law and Civilian countries enjoy broadly similar degrees of shareholder protection. Likewise, in both systemic camps, shareholders have various legal means of challenging resolutions passed by the board of directors of companies which are sullied by the self-interest of the directors involved in the decision-making process. The various procedures for such challenges vary greatly, as do the eligibility requirements and conditions for their operation and availability, for instance via shareholder derivative proceedings, individual shareholder actions, or hybrids between such derivative and personal claims, etc. However, whilst there are such variations, the underlying premise of the legal origins claim does seem overdone in this context insofar as most of the twelve jurisdictions will provide shareholders with an avenue to obtain relief where the directors have engaged in some form of self-interested dealings or activities.

Case Study 10 (Limitations on the Shareholder's Right to Transfer Shares)

A demarcation line between Civilian and Common Law countries can be detected in this case study when the twelve jurisdictions are scrutinised for the recognition, operation and enforceability of existing shareholders' pre-emption rights on the intended transfer of another shareholder's shares to a third party. For example, Common Law countries tend to impose few, if any, restrictions on the ability of shareholders to invoke and enforce such pre-emption rights as a means of preventing the sale of shares in a non-listed public company to a third party outsider. In this way, shareholders enjoy high levels of protection of their interests and rights. This can be contrasted with Civilian jurisdictions where one finds ex ante and ex post legal controls on the pre-emption rights of shareholders, which in certain cases, will translate into the failure of such provisions to bite. The same division in the legal position along Common Law/Civilian lines can be seen in the case of the operation of existing shareholders' pre-emption rights which are applicable on the death of a shareholder. In Common Law countries such as the UK, US and South Africa, such clauses are not subjected to regulatory or legal limitations on their operability, which can be contrasted with Civilian systems where there is more scope for them to be challenged.

Conclusions

Table 12.5 sets out the various findings.

Table 12.5: Results from Case Studies Regarding the Legal Origins Claim

Case Study	Legal Origins?	Observation
3	*x*	No evidence
4	✓	Some, but mixed, evidence
5	*x*	No evidence
6	*x*	No evidence
7	*x*	No evidence, and in fact, some evidence of the opposite
8	✓	Some, but mixed, evidence
9	*x*	No evidence
10	✓	Clear evidence
Total	3	

The findings illustrated in table 12.5 give rise to the proposition that there is scant evidence for the legal origins claim. With this final conclusion drawn, at this juncture, we now move to a discussion which tries to make sense of the composite results.

IV. Conclusions

A. Introduction

In this final section, we first explore the limitations inherent in this study. With those caveats in place, the conclusions that can be drawn from the evaluation of each of the four claims are presented. In the final analysis, the discussion then turns to the scrutiny of these results, as well as their relationship to the arguments presented in the existing comparative corporate law scholarship.

B. Limitations

There are of course, various limitations to our approach. Some have been identified in sections II and III above. However, others are more systemic. First, we recognise that it is impossible to extract and process all pertinent information on a legal system's approach to a particular corporate problem from the ten case studies. By dint of the nature of the study, this chapter presents a limited sample, particularly in the case of the evaluation of the plausibility of the patterns of shareholder ownership claim, which only draws on two case studies. Having said that, even with the restricted numbers of case studies in the latter case, the results drawn represent a sizeable proportion of the overall number of permutations arising from ten case studies and twelve jurisdictions.

Secondly, only a selection of the legal rules that act directly to regulate a socio-economic issue may have been spelled out in the national reports to the case studies, or extracted from the case studies in this chapter for the purposes of the evaluative exercise adopted in section III. Furthermore, certain extra-legal means of resolving the relevant problems may have been omitted. Nevertheless, we would argue that great value remains in pursuing a rule-based comparative approach in this study, especially when taken together with the numerical study of the legal rules and outcomes in the subsequent chapter. There is the distinct prospect that the application of differing comparative methodological approaches – in this and the following chapter – towards the evaluation of the governing legal rules adopted by the various jurisdictions in response to the corporate or socio-economic problem may generate diverse findings. Of itself, therefore, the application of diverse methodological techniques is extremely valuable in throwing structural variations of approach into sharp relief.

Thirdly, an inherent weakness of this study lies in the tendency to categorise legal rules in a binary manner, for instance that either a rule in country X says A, or it says B, or that it functions in manner C, and if not, then in manner D. However, by their very nature, legal rules are subject to a 'penumbra of uncertainty', particularly so at the borders.[65] Since they are mutable, they are not always capable of a single or fixed interpretation according to an 'either/or' or algorithmic approach.

Fourthly, we should stress that we have tended to focus on the controlling rule or rules that govern a particular corporate issue, rather than the conditions to the applicability of such rules, or the exceptions where they do not apply. The fifth point to make is that this exercise

[65] HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Oxford University Press, 1994) 125–27.

entails an assessment of the 'law in the books' rather than the 'law in action'. One of the oft-versed criticisms of comparative evaluations of the laws and rules of legal systems is that they only assess the actual hard law. If we factor in the point that laws do not enforce themselves but rely on extra-legal factors for their vitality and efficacy – such as the economic resources allocated towards enforcement, the configuration and force of procedural laws and safeguards, the position of legal institutions and fields that lay adjacent to corporate law (such as general commercial laws, private laws, etc), as well as the general population's respect for the law and properly functioning systems for civil dispute resolution (such as courts, arbitration systems, etc) – it soon becomes apparent that a simple analysis of the rules 'in the books' may be missing a fundamental trick.

Finally, the methodology in this study is less mathematical, scientific and precise than the leximetric approach adopted in the subsequent chapter inasmuch as the comparative assessment of the relevant legal rules and their functions is much more impressionistic and qualitative in nature. Nevertheless, the technique pursued in this chapter follows faithfully the traditional rule-based method of comparative law, as adapted and particularised to comparative company law by LoPucki,[66] which has the capacity to pick up shades of difference which may be overlooked in more numerical evaluations of legal rules and their functions insofar as these adopt a cruder binary form of assessment of compared rules.

C. Results

The findings derived from the rule-based evaluation of the case studies can be illustrated in a table, as follows:

Table 12.6: Results from Evaluation of Case Studies for Evidence of Four Claims

Claim	Evidence	No Evidence
Convergence	*x*	✓
Patterns of Shareholder Ownership	*x*	✓
Shareholder Primacy	✓	*x*
Legal Origins	*x*	✓

[66] LoPucki, 'A Rule-Based Method for Comparing Corporate Laws' (n 1).

Overall, the results of this chapter suggest that three out of the four primary claims are unsubstantiated, which does appear to support the positions of the various sceptical commentators discussed in section II. On their face, some of the findings appear to be coherent and in harmony with each other. For example, the separate findings that there is little evidence for both the patterns of shareholder ownership and legal origins claims are both consistent to the extent that the structure of shareholder ownership of corporations in Common Law jurisdictions tends to be dispersed (eg the UK and the US), unlike the position in Civilian legal systems.

But if the results are indeed correct, then how can we explain their inherent inconsistencies? For instance, the proposition that there is substance to the shareholder primacy claim would appear to conflict with the simultaneous rejection of the convergence claim: one of the original arguments advanced by Hansmann and Kraakman for the convergence claim was that the superiority of the shareholder-oriented model would be the principal factor that would push forward the alignment of the formal corporate laws of legal systems.[67] The same inconsistency objection can be aimed at the conclusions validating the shareholder primacy claim whilst rejecting the legal origins proposition: if the results demonstrate that the nature and orientation of the legal rules in both Common Law and Civilian countries prioritise the protection of shareholders, then how can it be argued with any confidence that Civilian and Common Law legal systems exhibit a range of diversity? Likewise, as regards the doubt they cast on both the convergence and patterns of shareholder ownerships propositions, since the rejection of the argument that the governing company law rules vary according to the structure of shareholder ownership in a jurisdiction provides some indirect support for the convergence claim. These questions take us to a more in-depth discussion of the implications of the findings.

D. Analysis and Implications

The findings produced from case studies 3 to 10 doubt the descriptive accuracy, predictive power and normative bite of the convergence claim. This is perhaps ironic: it is unsurprising to the extent that it stretches credulity to assert that global divergences in the form or function of corporate laws will be crowded out overnight or even gradually as a result of the

[67] Hansmann and R Kraakman, 'The End of History for Corporate Law' (n 8) 440–441.

irresistible forces of globalisation and imitation; whilst at once surprising inasmuch as it fails to cohere with the additional finding that the shareholder primacy claim appears to be sound. Perhaps the answer to this conundrum lies in Jeff Gordon's notion of 'divergence-within-convergence'.[68] This notion can encompass three separate strands. The first is the idea that whilst convergence in corporate law is indeed taking place, it is masked by the fact that it is proceeding at such a glacial pace that the capacity to detect a measure of alignment is strained: however, subject to the caveat struck at section III A above, our findings do not substantiate this interpretation. Secondly, there is the argument that diversity in legal rules often occurs within the rubric of a convergent legal framework: the results do support this approach and the classic example is the convergence we can see across EU Member States in the field of corporate law.[69] This EU convergence may not translate into global convergence, which is exactly what the findings from this study bear out. Thirdly, there is the concept of convergence in principle, but divergence in practice. The results drawn from case studies 7 and 8 are an excellent illustration of the point as they establish the existence of a particular general legal principle that is expressed as a governing legal rule or rules, for instance the ability to challenge the non-payment of dividends or to challenge merger resolutions, but then go on to articulate considerable degrees of variation in the nature in form or function of the rules, as well as the machinery for their operation, or the conditions for, or exceptions to, their exercise.

The failure of the findings to cohere with the patterns of shareholder ownership proposition is an interesting outcome. This claim essentially hinges on the contention that the law is a passive recipient of reforms that stem from the economic infrastructure of a jurisdiction. In terms of this world view, it is the economic, commercial and social context that determines the shape that the law takes. Perhaps this claim fails to appreciate the salience of the converse proposition that the 'law matters'. In other words, that it is the law that influences the patterns of shareholder ownership rather than the opposite way round. Indeed, Cheffins's research furnishes some support for this proposition. He makes the argument that the dispersed system of shareholder ownership in the UK is partly attributable to legal reforms in stock exchange listing rules, and tax, takeover and pensions law.[70]

The success of the shareholder primacy claim aligns with the various claims made in the academic literature about the descriptive position in the corporate laws in many jurisdictions.

[68] Gordon, 'Convergence and Persistence in Corporate Law and Governance' (n 7) 41-45.
[69] Case study 4 covering takeover rules is a good example of the point.
[70] B Cheffins, 'Corporate Ownership and Control' (n 13) ch 9; B Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 *Journal of Legal Studies* 459.

However, it should not cloud the fact that the results suggest that the US is an outlier insofar as it eschews the standard shareholder oriented model and clings to the vestiges of a managerialist approach to corporate governance in the guise of the director primacy model. A similar point can be made about the position in France, Germany and the Netherlands which exhibit affinities with a stakeholder oriented model.

Turning to the persuasiveness of the legal origins claim, our results clearly provide little support for this proposition. This is reflective of recent mounting economic evidence derived from research conducted by economists and empirical legal researchers. For example, empirical research suggests that corporations operating in legal and corporate governance systems adopting the shareholder primacy norm with higher levels of shareholder protection will tend to (i) have lower firm-level profits[71] and (ii) invest fewer resources in product innovation, research and development than in stakeholder regimes.[72] These findings have an impact on the purchase of the legal origins claim, since the evidence indicates a reversal of the finding that firm-level profits will be suppressed in the case of companies trading in Civilian jurisdictions conforming to the shareholder primacy claim with high levels of shareholder protection.[73]

As for the apparent inconsistencies in the results mentioned in section III C above, on closer inspection, it can be argued that the rejection of the convergence claim alongside the substantiation of the shareholder primacy norm is not as puzzling as it might first seem. Table 12.4 demonstrates that many jurisdictions prioritise the interests of a complex mixture of parties' interests. As such, shareholder primacy provides the main, but not exclusive, explanation of what is going on. To overlook these 'side stories' would be to illegitimately discount the possibility that there is indeed some divergence in the legal positions of countries, which is hidden immediately beneath the headline narrative. In the case of the perceived mismatch in the findings that dismiss the legal origins claim but substantiate the shareholder primacy proposition, it may be that this can be explained by the close alignment of the controlling legal rules in the UK and EU. In addition, the results for another Common Law jurisdiction, namely the US, are positively ambivalent regarding the level of shareholder protection, as many of the entries in Table 12.4 show that the governing legal rules are just

[71] Z Adams and S Deakin, Corporate Governance and Employment Relations in J Gordon and W-G Ringe (eds) *The Oxford Handbook of Corporate Law and Governance* (Oxford, Oxford Univerity Press, 2018) 1037; D Chai, S Deakin, P Sarkar and A Singh, *Corporate Governance, Legal Origin and the Persistence of Profits*, CBR WP Series No. 465, December 2014.
[72] Adams and Deakin, ibid; J Graham, C Harvey and S Rajgopal, *The Economic Implications of Corporate Financial Reporting*, NBER Working Paper No. 10050 (2005) 15-19; J Asker, J Farre-Mensa and A Ljungqvist, *Comparing the Investment Behavior of Public and Private Firms*, ECGI Finance Working Paper 282/10 (2012) 6; F Belloc, 'Law, Finance and Innovation: The Dark Side of Shareholder Protection' (2013) 37 *Cambridge Journal of Economics* 863, 885.
[73] Adams and Deakin, ibid; Chai et al, *Corporate Governance, Legal Origin and the Persistence of Profits* (n 71).

as, if not more, likely to prefer the interests of directors as they are of shareholders. Finally, the contention that the dual rejection of the patterns of shareholder ownership and convergence claims is incompatible, stretches matters too far. While the dismissal of the former is consistent with the convergence proposition, it does not necessarily provide *positive* support for it. It is equally plausible that there is no evidence of any convergence.

Annex: Supporting Tables and Evidence

Claim 3: Case Study 1 (General case on Directors' Duties):

This annex provides a brief explanation of our findings as set out in Table 12.4. However, we will not provide a detailed elaboration for each case study, and the findings for each case study (bar case study 1) are illustrated only in a table. Instead, it is only for case study 1 that a detailed account is provided, which ought to be sufficient to furnish an indication of our thinking and how we reached our results.

Latvia

Here, there is some evidence of a system that does not favour the shareholder primacy claim, especially if one considers that shareholders do not have the authority to ratify the actions of the directors or to authorise them in advance. It is specifically stated that the ultimate authority does not reside with the shareholders and that they thus do not have the power to waive the breach in question. Mr B, in question, can still be liable even if the shareholders do approve his conduct.

By considering the law on directors' duties and possible breaches, in this case study, there is no evidence supporting either a shareholder-orientated or a stakeholder dominant system.

France

A rule, similar to the business judgment rule, is applicable in France. The courts in France generally do not second-guess the decisions of the board, as long as the company remains solvent. This shows some evidence of director primacy. There is also some evidence of stakeholder protection based on the protection offered to creditors (see para iii of Case Study 1, France). Shareholder approval or ratification is not possible which is in line with the director primacy norm.

Germany

The business judgment rule, developed through case law, is applicable in Germany. This is in line with the director primacy claim insofar as a presumption operates to insulate directors from liability. Shareholder approval is also not absolute, which is in line with the director primacy proposition, as ex ante authorisation is possible but not ex post ratification.

Italy

Legal principles similar to the business judgment rule are applied in Italy (see footnote 45, Case Study 1 on Italy). These principles protect directors when they perform their duties. It is stated that the position with regard to shareholder authorisation or ratification, in the case of a breach of duty by a director, is not clear. We therefore cannot draw any conclusions from this. There is some evidence of a stakeholder approach in the context of the position of creditors when a company is in financial trouble. It states that the directors must call a general meeting (see article 2482-*bis* of the Civil Code), otherwise they will be held personally and jointly liable to the creditors and third parties for any loss suffered. This provides a high level of protection for stakeholders.

Spain

The business judgment rule has been recognised through case law for a long time and is now incorporated into legislation (since 2014, see Ley31/2014). Creditors also receive a lot of protection as directors will be held liable, jointly, to the company, shareholders and the creditors in the case of a breach (see LSC, articles 236.1 and 237). Directors also have additional duties in cases of corporate insolvency (this is regulated in *Ley Concursal 22/2003*). Shareholders, in general meeting, are also not able to relieve a director from liability.

The Netherlands

The business judgment rule is part of Dutch law. Shareholder approval of breaches of directors' duties in the case of private limited liability companies is possible, as long as this is sanctioned in the articles of association. Mere consent of the shareholders, like the 95 per cent shareholders in this case, will not exempt the directors from a potential breach of their duties. Creditors are protected, albeit under tort law, as they can file a claim if, like *in casu*, the directors entered into a contract at a time when it ought to have been clear that the company would not be able to fulfil the obligations. This is also possible with regard to third parties. In the case of bankruptcy, then the liquidator or receiver can bring legal proceedings against the board of directors if it can be established that the board performed its duties in an improper manner. This is equally possible for private and public limited liability companies.

Finland

The business judgment rule is applicable in Finland. However, this is not based on a specific article in the companies' legislation but instead is mentioned in the preparatory works to the CA and is based on Finnish legal literature.

The purpose of a company in Finnish law is to make a profit (section 5 of the CA), unless otherwise stated in the articles of association. This creates, at first sight, the impression of a shareholder primacy model. It is, however, stated that directors will be held liable to the company, shareholders or a third party for damage caused deliberately or negligently in violation of the CA or the company's articles of association. This is evidence of a more stakeholder-orientated approach. This goes further stating that a shareholder's consent, to the loan in this case, will not free the director from liability to the creditors for damages. A shareholder might even be found liable for damages to the creditors of the company should he ratify or authorise the transaction (Chapter 22, section 2 of the CA).

Poland

The original power of a company is vested in the shareholders in general meeting according to Polish law.

The business judgment rule does not apply; rather there is a presumption in favour of a breach of duty. As such, a director must prove that he or she is not culpable. This is very much evidence of shareholder primacy. The shareholders can, however, 'protect' the directors by authorising their conduct or ratify it ex ante. If a 95 per cent shareholder approves of the conduct then it will be highly unlikely that the director will be held liable.

The UK

Under UK law, the management of a company, both private and public, is conducted by a unitary board. The powers of the management are subject to instruction and initiation rights vested in the shareholders. The original decision-making power thus rests with the shareholders but this is delegated to the board of directors. Shareholders are still able to authorise the conduct of the board or ratify it afterwards. In this case, the loan transaction was ratified so the director cannot be sued for breach of duty.

The duty to act with the necessary care, skill and diligence is codified in the UK Companies Act 2006, but there is no business judgment rule. In addition, there is no direct protection available to creditors (only via the liquidator in certain instances). The evidence is thus clearly in line with the shareholder primacy model.

The US

The business judgment rule is applied by the Delaware courts. There are also often clauses in corporate documents protecting directors from personal liability. This is in line with the director primacy claim. Shareholders do not manage the corporation but they are entitled to vote on certain matters such as the removal and appointment of directors. There is no evidence in this case study of any protection, on a direct basis, in favour of creditors.

South Africa

The position in South Africa has changed with the enactment of the Companies Act 2008 as the management of the company is now within the ultimate control of the directors. Shareholder authorisation or ratification is no longer possible. The directors are the ultimate decision-makers (see section 66). The business judgment rule has been codified in the Companies Act 2008 giving additional protection to directors. Various sections in the Companies Act 2008 provide stakeholders with ample protection, such as for example section 22 and especially section 218(2). The latter is very wide as it states that any person who contravenes any provision of the Companies Act 2008 will be liable to any other person for any loss or damage suffered by that person as a result of the contravention.

Japan

The business judgment rule is applicable in Japan. This has been established through case law and functions analogously to that in US case law. Shareholder authorisation is also possible. If, however, authorisation or ratification occurs informally as in this case rather than at a general meeting, then it will only be possible if all shareholders with voting rights agreed to it. There is evidence of some direct protection to creditors, but in the context of criminal law.

Claim 3 – Tables:

Table 12.7: Case Study 1

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
Latvia			✓
France		✓	✓
Germany			✓
Italy		✓	✓
Spain		✓	✓
The Netherlands		✓	✓
Finland		✓	✓
Poland	✓		
UK	✓		
US	✓		✓
South Africa		✓	✓
Japan	✓		✓

Case Study 2: The issues addressed in this case study do not make any useful contribution towards testing the validity of the shareholder primacy claim.

Table 12.8: Case Study 3

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
		N/A for this case study	
Latvia			✓
France			✓
Germany	✓		
Italy	✓		
Spain	✓		
The Netherlands	✓		✓
Finland	✓		
Poland			✓
UK	✓		
US			✓
South Africa	✓		
Japan			✓

Table 12.9: Case Study 4

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
Latvia	N/A		
France		✓	
Germany		✓	
Italy	✓		
Spain	✓		
The Netherlands		✓	
Finland	✓		
Poland	✓		
UK	✓		
US			✓
South Africa	✓		
Japan			✓

Table 12.10: Case Study 5

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
Latvia			No (Based On German Law)
France		✓	NO
Germany		✓	NO
Italy		✓	NO
Spain		✓	NO
The Netherlands		✓	NO
Finland		✓	NO
Poland		✓	*No evidence*
UK		✓	NO
US		✓	*No evidence*
South Africa		✓	NO
Japan		✓	NO

Table 12.11: Case Study 6

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
			N/A for this case study
Latvia		✓	
France		✓	
Germany		✓	
Italy	✓		
Spain		✓	
The Netherlands		✓	
Finland		✓	
Poland		✓	
UK		✓	
US	✓		
South Africa		✓	
Japan		✓	

Table 12.12: Case Study 7

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
		N/A for this case study	
Latvia	✓		✓
France	✓		
Germany	✓		
Italy	✓		
Spain	✓		
The Netherlands	✓		
Finland	✓		
Poland	✓		
UK	✓		
US			✓
South Africa	✓		
Japan	✓		

Table 12.13: Case Study 8

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
		N/A for this case study	
Latvia	✓		✓
France	✓		
Germany	✓		
Italy	✓		
Spain	✓		✓
The Netherlands	✓		
Finland	✓		
Poland	✓		
UK	✓		
US			✓
South Africa	✓		
Japan	✓		

Table 12.14: Case Study 9

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
		N/A for this case study	
Latvia	✓		
France	✓		
Germany	✓(VERY WEAK)		
Italy	✓(VERY STRONG)		
Spain	✓		
The Netherlands			✓
Finland	✓		
Poland	NO EVIDENCE HERE		
UK	✓		
US	✓		
South Africa	✓		
Japan	✓		

Table 12.15: Case Study 10

Jurisdiction	Evidence of shareholder primacy	Evidence of stakeholder protection	Evidence of director primacy
		N/A for this case study	
Latvia	✓		
France	✓		
Germany	✓(WEAK)		
Italy	✓		
Spain	✓		
The Netherlands	✓(STRONG)		
Finland	✓(WEAK)		
Poland	✓		
UK	✓(STRONG)		
US	✓(STRONG)		
South Africa	✓(STRONG)		
Japan	✓(WEAK)		